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1357  
No. 4062

IN THE

1357  
**United States Circuit Court  
of Appeals**  
NINTH CIRCUIT

PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY,

Defendant in Error.

**Plaintiff in Error's Brief**

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## STATEMENT OF FACTS.

On, to-wit, July 1, 1917, the Defendant in Error purchased from the DuBois Lumber Company 27,331.31 acres of timber land located in Tillamook, Columbia and Clatsop Counties of the State of Oregon, for the sum of \$3,650,000.00. This acreage was heavily timbered and was valuable chiefly for its timber. There were no transportation facilities available for this timber. It was located in a contiguous body and after the Defendant in Error had secured title to this property, the Defendant in Error desired to develop this property and market the timber thereon, and its first desire was to secure transportation facilities.

The Plaintiff in Error was probably more familiar with the contour of the country and the means best calculated to bring about a development of this property than any other known person. The Plaintiff in Error had traveled over this property many times, had spent weeks and months upon it and was instrumental in the sale of said property by the DuBois Lumber Company to the Defendant in Error. This Plaintiff in Error had also known the Eccles people for many years, had known Chas. T. Early for some thirty years. The Eccles people, who were the owners of the Defendant in Error, had been operating sawmills and logging camps in the State of Oregon for over thirty years, and at the time of this purchase were then the owners of and operating some five lumbering and logging plants in the State, all of which were under the immediate

management of Chas. T. Early. In addition to the lumbering operations, the Eccles people also owned and operated two railroads in the State of Oregon, a line out of Mt. Hood, Oregon, and one out of Baker, Oregon. The lumbering and logging operations of the Eccles interests were carried on under the corporate name of The Oregon Lumber Company. The Defendant in Error was organized for the specific purpose of developing the timber land acquired on July 1, 1917.

Immediately after this timber was acquired and taken in the name of the Defendant in Error, the Plaintiff in Error was employed by Chas. T. Early, who was a director, stockholder, incorporator and managing agent of the Oregon-American Lumber Company, as well as of the Oregon Lumber Company.

The Defendant in Error, through its agents and officers, realizing the Plaintiff in Error's knowledge of the country and knowing his connection with other operating concerns near the vicinity of this logging operation, desired his services as a special employee, and during August of 1917, the Plaintiff in Error entered upon the performance of his duties.

This body of timber, located as it was in several counties, without any rail or water transportation, presented to the Defendant in Error the problem of how best to secure an outlet to the market. There were a number of routes which might be utilized. The Wheeler people had a railroad to within a few miles of this tract. The United Railway Company,



operating out of Linnton, Oregon, also had a railroad which might be extended into this property. The Portland and Southwestern Railroad Company, likewise, had a line operating from Scappoose, Oregon, in the direction of this timber. The C. R. McCormick & Co. interests at St. Helens, Oregon, likewise, were the owners of a railroad which might be extended to this property. The Plaintiff in Error was acquainted with these various companies, was interested in a financial way in one of them, and the Defendant in Error being aware of these facts, employed this Plaintiff in Error to negotiate with these various concerns in the hope of securing an advantageous route to this timber, so that the same might be placed upon the market.

The Defendant in Error purchased this timber for manufacturing. Its officers, agents and stockholders had been engaged in the manufacture of lumber and its by-products for many years.

The Plaintiff in Error alleges in his complaint that during August, 1917, he being familiar with the timber, knowing its condition, the contour of the country and the possibilities of development, this Defendant in Error did employ the Plaintiff in Error to assist and aid in developing and marketing said property and employed him to devise ways and means of securing the best possible returns from said property, and that in consideration of said services the Defendant agreed to pay his expenses and for his services, and that thereafter this Plaintiff did work for the Defendant in Error for a period of

approximately three and one-half years. That he interviewed the St. Helens Timber Company and C. R. McCormick & Co. and after negotiating with them, at the request and direction of the Defendant in Error, he secured from C. R. McCormick & Co. an option on its logging railroad, equipment, road-bed, rights of way and terminal facilities in St. Helens, which option was effective for a period of six months; and Plaintiff in Error alleges that he made a trip to San Francisco and that he made other trips to St. Helens, Oregon, and it is further alleged that the said Plaintiff in Error interviewed Coleman R. Wheeler, who was the owner of the logging railroad near the south end of this property in Tillamook County, in the hope of securing transportation facilities over the line of Coleman R. Wheeler for the timber situated on the property owned by the Defendant in Error; and Plaintiff in Error alleges that he interviewed and negotiated with the Fir Production Department of the U. S. War Industry Board, in the hope of securing aid from this Department in securing transportation facilities; and it is alleged that the Plaintiff in Error made a number of trips to Cochran, Oregon, at his own expense in his efforts to secure an outlet for this timber; and a like allegation is enumerated in the complaint regarding the negotiations with the Portland & Southwestern Railway Company, which company owned a railroad in Columbia County, the terminus of which was located at Scappoose, Oregon, and after various negotiations, the Plaintiff in Error



secured a proposal from the said Portland & Southwestern Railway Company for the sale of a one-half interest in the railroad, equipment and rights of way, based upon a total valuation of \$280,000.00; and a like allegation is enumerated in the complaint regarding negotiations with the United Railway Company, which company operated a railroad out of Linnton, Oregon, in the direction of this property, and through the efforts of this Plaintiff in Error, as he alleges, a lease was finally secured of this railroad for a period of ninety-nine years at an annual rental of \$45,000.00, and this United Railway was afterward extended into this timber; and Plaintiff in Error further alleges that he interviewed Mitsui & Company, Norman R. Smith, F. W. Reimers, E. P. Denkman, E. S. Collins and many other lumbermen of the East and West who might be interested in said property. Some of the negotiations undertaken by the Plaintiff in Error were for the sale of a portion of said property; others of the negotiations looked toward the sale of a portion of the capital stock of the Defendant in Error.

It is further alleged and it is a fact that all these negotiations were carried on by the Plaintiff in Error at the special instance and request of the Defendant in Error. Plaintiff in Error was a special agent. He had no authority to consummate any of these transactions. His authority was limited to securing proposals, making investigations and reporting to the officers of the Defendant in Error. This he did for a period of approximately three

and a half years. The evidence discloses that a small portion of this tract of timber was sold to the Inman-Poulsen Lumber Company, and that eventually the entire stock of the Defendant in Error was transferred to the Central Coal & Coke Co. of Kansas City, Missouri.

For these services, extending over a period of several years, and expenses, this Plaintiff seeks to recover.

The Articles of Incorporation which were introduced in evidence provide "That the duties of the General Manager shall be to look after and superintend all the affairs of the company, subject to such regulations as may be imposed by the Board of Directors, to employ all assistance and labor necessary therefor, contract for the compensation of all employees and discharge any person so employed."

Chas. T. Early, with whom the contract of employment was made, testified in answer to the question as to what his position was, as follows: "I always understood I was General Manager."

The Articles of Incorporation, as introduced in evidence, show that Chas. T. Early was a stockholder and an incorporator of the company, and that he was the holder of five hundred shares of \$100.00 each, of the capital stock of the company.

The evidence also shows that David C. Eccles was the President of the Defendant in Error company and that he held practically all of the stock of the



corporation, as trustee, holding 31,000 of 35,000 shares.

The statutory power of attorney required by the corporation laws of the State of Oregon was introduced in evidence and discloses that Chas. T. Early was the statutory agent for the State of Oregon.

In the Defendant in Error's Declaration of Intention to do business, Chas. T. Early is designated as a Director, Vice President and Attorney in Fact for the corporation. David C. Eccles is designated as a Director and President. These designations of the authority of Charles T. Early and David C. Eccles were all made in the regular course of business, in compliance with the laws of the State of Oregon, and all were filed prior to the date of the contract between the Plaintiff in Error and the Defendant in Error.

The State or Oregon Corporation Department also requires an annual statement to be filed with the Corporation Commissioner. These annual statements were introduced in evidence and disclose that Charles T. Early was designated in various capacities, as Vice President for the year 1917; the year 1918 as Attorney in Fact and Managing Agent; the year 1919 as Attorney in Fact and Managing Agent; 1920, Attorney in Fact and Managing Agent; 1921, Attorney in Fact and Managing Agent.

Chas. T. Early was placed on the witness stand and testified as follows:

A. Well, immediately after the property was purchased, we sought the best methods of developing

the property. The property was bought for development and not for holding or for speculation. It had no transportation and I think about the first thing that was done was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad.

Q. Who made those arrangements with Mr. Bates, did you or who was it?

A. I did.

\* \* \* \* \*

Q. Were you in conference with the officers prior to that time?

A. Yes, sir.

Q. What ones?

A. Well, particularly the President of the company, Mr. David C. Eccles.

Q. How often would you be in contact with Mr. Eccles?

A. Oh, he would come out and sometimes would stay for a day or two, sometimes he would stay for a week.

Q. Was all the timber holdings and property of that corporation in this state?

A. Yes, sir.

Q. As far as you know, did any other officers of this corporation or director live in the state besides yourself?

A. No, sir.

Q. Who handled here the business of this company in the handling and operation of the property?

A. I did.



Q. I wish you would state—the Court has said that what it wants to know and what the jury wants to know, is what you did, Mr. Early, in your capacity in reference to the Oregon-American Lumber Company. Can't you tell just exactly what you did?

A. Yes, there wasn't a great deal done just at that time. I looked after the taxes, hired a tax agent and hired cruisers when it was necessary to hire them, and arranged for fire patrol.

Q. In hiring people here, state whether or not you did that yourself here on your own authority for this company?

A. I did all that I have stated, yes, sir.

\* \* \* \* \*

Q. And any employment you had there for the Oregon-American Company, who made that employment or request for the attorneys?

A. Well, whatever business that came up that we had to consult an attorney, we took it there. I arranged with them as to fee.

Q. For the Oregon-American Lumber Company?

A. Yes, sir.

Q. State whether or not those were paid by the Oregon-American Lumber Company.

A. They undoubtedly were.

Q. Was any objection ever raised as far as that was concerned, to your handling that matter, employing attorney to look after their affairs?

A. Not to my knowledge.

Q. Now, the question of any office help, or other

things of that kind in handling their office here, who employed that help?

A. Well, I talked it over with the cashier, but he usually hired the help.

Q. But under whose general direction and supervision?

A. Well, under my supervision. If it was necessary to put on another man, or woman, why, we discussed it and he was authorized to do it.

Q. Now, how many meetings did you attend, would you say, at Salt Lake or Ogden—where were those meetings held?

A. Ogden.

Q. How many stockholders' or directors' meetings did you attend?

A. I think about four.

Q. All of them at Ogden?

A. All at Ogden, yes.

Q. Who were present at those meetings?

A. Well, I don't know as I could name everybody that was present.

Q. Well, do as well as you can.

A. There was Mr. Devine.

Q. That is the gentleman sitting here?

A. Yes, sir. Mr. Browning, Mr. Royal Eccles, J. M. Eccles, Marrian Eccles, Jos. Scocroft and I think Mr. Wattles.

\* \* \* \* \*

Q. The idea being at that time not to dispose of your property, but to develop to operate?



A. Yes, sir.

Q. And in the complaint in this case, which has been spoken of here, I believe you spoke of the McCormick matter, which you have talked with Mr. Bates about. Did you ever discuss that particular matter or phase with Mr. Eccles or the directors?

A. I discussed it with Mr. Eccles. In fact, we were down there together with Mr. Eccles; made one or two trips.

Q. Then on this, which is known as the first item here, the McCormick and St. Helens matter, I understand you and Mr. Eccles, president of the company, and Mr. Bates went out on it?

A. Yes, sir.

Q. Do you know what was said to Mr. Eccles as the president of this company as to what was being done, or what Bates was doing? or the relation between you and Bates?

A. Well, Mr. Bates was instructed to get an option on the McCormick—

\* \* \* \* \*

This evidence discloses that the President, Mr. David C. Eccles, who held 31,000 of the 35,000 shares of stock in his own name, as trustee, who was also President and Director of the company, knew all about the hiring and knew what Plaintiff in Error was doing, and, in fact, instructed Mr. Bates to carry on some of these negotiations.

Mr. Early also testified that Mr. David C. Eccles, the President, and Mr. Bates himself made a trip over the Coleman R. Wheeler property, and in gen-

eral Mr. Early testified that David C. Eccles was fully informed as to what Plaintiff in Error was doing and that he was working on these various matters. That he made no objection to it. Mr. Early also testified that David C. Eccles, the President, instructed Mr. Bates at certain times to perform certain services, being some of the same services set forth in the complaint. Thus, the evidence discloses that the Vice President and the President hired, authorized and directed Mr. Bates to perform these services and they agreed to pay him. Not only this, but the evidence discloses that the Defendant in Error profited by Mr. Bates' services, ratified his acts in consummating certain of the negotiations which Mr. Bates originated and secured for them, and for which Mr. Bates seeks remuneration.

It is also in evidence that Mr. Early communicated with the various officers, agents and directors of the Defendant in Error company at Ogden, Utah, the home office of the Defendant in Error, and that these officers at various times authorized and instructed Mr. Early to proceed with matters which Mr. Bates had formulated and investigated.

Mr. Early also testified that no objection was ever made to the employment of Mr. Bates.

At the close of Mr. Early's evidence a motion was made to strike from the record all of his evidence. This motion was allowed and an exception was granted. An offer of proof was then made, which offer was rejected and a verdict was directed



by the Court in favor of the Defendant in Error.

The Plaintiff in Error makes two contentions:

First: That the evidence here discloses that Chas. T. Early and David C. Eccles being the Managing Officers of the Defendant in Error corporation, both being directors and stockholders of the company, and being the only active members of the company, had authority to hire Mr. Bates to assist in developing this property. His employment was that of a special agent.

Second: The contention of the Plaintiff in Error is that the defendant company, for a period of three and a half years, took advantage of the Plaintiff in Error's services, ratified his acts, took the fruits of his labor and is now estopped to claim that he was not hired by its Board of Directors.

The Answer pleads the want of authority to hire Plaintiff in Error, and the Reply sets up an estoppel and ratification of Plaintiff in Error's labor.

## POINTS AND AUTHORITIES.

Chas. T. Early and David C. Eccles, being the managing agents, directors, stockholders and incorporators of Defendant in Error, had authority to employ Mr. Bates, particularly when his employment was acquiesced in, acted upon and ratified by the Defendant in Error.

Fletcher's Cyclopedia of Corporations, Vol. III, pages 3278, 3281, 3285.

Sun Printing Co. vs. Moore, 183 U. S. 642-651.

Russell vs. Washington Savings Bank, District of Columbia Appeal Case, Vol. 23, pages 398-407.

Chilcott vs. Washington State Colonization Co., 45 Wash. 148-152; s. c. 88 Pac. 113.

Kitzmiller vs. Pacific Coast & N. Packing Co., 90 Wash. 357-363; s. c. 156 Pac. 17.

Aerne vs. Gostlow, 60 Ore. 113-121; s. c. 118 Pac. 277.

Rae vs. Heilig Theatre Co., 94 Ore. 408-412; s. c. 185 Pac. 909.

West vs. Washington Railway Co., 49 Ore. 436-445; s. c. 90 Pac. 666.

Pettibone vs. Lake View Town Co., 134 Calif. 227-228.

Atlantic & Pacific Rld. Co. vs. Reisner, 18 Kans. 458-460.

Oakes vs. C. W. Co., 143 N. Y. 430.

The Defendant in Error company, having taken the fruits of the Plaintiff in Error's labor and having consummated contracts entered into by Mr. Bates, it is now estopped from claiming that the Plaintiff was not hired by the proper officers.

Rae vs. Heilig Theatre Co., 94 Ore. 408-412; s. c. 185 Pac. 909.

David C. Eccles, the President of the company, knew that Mr. Bates was rendering services for the company. He was so informed by Mr. Early.

Notice to an officer or agent of a corporation in the course of his employment concerning the affairs of the corporation is notice to the corporation, re-

gardless of whether the officer imparts the knowledge to the corporation or not.

Saratoga Investment Co. vs. Kern, 76 Ore. 243.

Weber vs. Richardson, 76 Ore. 286.

If there is any evidence tending to prove the issues made by the complaint the case is one for a jury.

Empire State Cattle Co. vs. Atchison Ry. Co., 210 U. S. 1-10.

Dernberger vs. Baltimore & O. R. Co., 243 Fed. 21-23.

The question of whether Early and Eccles had authority to employ Bates is a question of fact and should have been submitted to the jury.

Bagot vs. Intermountain Milling Co., 100 Ore. 127-132.

Rae vs. Heilig Theatre Co., 94 Ore. 408-412; s. c. 185 Pac. 909.

## ARGUMENT.

It is sometimes said that a corporation acts through its Board of Directors, but it is probably more correct to say that a corporation acts through its officers and agents. It is also often stated that a person deals with an agent at his peril, but this rule is also subject to the qualification that when a person deals with an officer of a corporation, or a managing agent, then the rule is somewhat different; the presumption being that an officer and a managing agent has authority to act for the corporation and bind it



with his contracts, whereas with the ordinary subordinate agent or salesman this is not the rule.

Here we have a state of facts where the president and managing agent, who was the vice president of the company, engaged the Plaintiff in Error to perform these services. Both of these officers were stockholders, the president holding practically all of the stock of the corporation, as trustee. They were the only active officers of the corporation, none of the other officers or directors living in the State of Oregon, where all of the assets and the property of the Defendant in Error is located.

Mr. Early testified that he had always managed the business of this corporation in this State; that the President, David C. Eccles, came to Portland quite often and during such times he was fully acquainted with all the facts pertaining to the employment of the Plaintiff in Error.

The evidence discloses that this timber, comprising 27,000 acres, was purchased for manufacture and not for speculation or holding. The company, a Utah corporation, desired to secure transportation facilities for this property, for without transportation facilities the property could never be developed, and all of the services performed by the Plaintiff in Error in this action looked toward the development of this property in the first instance. It is true that later on a desire to sell the property, or part of it, or part of the capital stock of the corporation, was manifested, and the Plaintiff in Error was employed to assist in securing purchasers for the prop-

erty, but in the first instance the services which Mr. Bates performed and for which he was hired were the ordinary usual services which a corporation, such as the Defendant in Error, would require, considering the purposes for which the timber was purchased. The services that Mr. Bates was employed to perform, and which we allege he did perform, were no more unusual or uncommon than the services of a cruiser of timber or a tax agent, or the ordinary superintendent or foreman in a logging camp. Mr. Bates was employed primarily to interview people and corporations, with a view to ascertaining whether transportation facilities could be secured. He had no authority to enter into binding contracts with other corporations. He was not employed in such a capacity, but he was ordered, requested and directed by the managing agent, vice president and president to interview people, secure options and report to them, and this is what he did for a period of many months during the primary stages of his employment. It is alleged in the complaint that he secured an option from the C. R. McCormick people; that he also secured a proposal from the Portland & Southwestern Railway Company, and that finally through his efforts, as we allege, he was instrumental in the Defendant in Error company securing a lease on the United Railway for a period of ninety-nine years, at an annual rental of \$45,000.00. His services were no more unusual or uncommon than the employment of an attorney to go out and secure a right-of-way from a farmer or

other owner, or for an attorney to interview operating concerns, with a view of securing traffic arrangements or transportation facilities.

Now, all these services Plaintiff in Error contends were peculiarly within the purposes for which the Defendant in Error corporation was organized. Without these transportation facilities and without an outlet for its timber the manufacture thereof was impossible. It is true that the Defendant company refused to consummate the options secured from the C. R. McCormick Company or the Portland & Southwestern Railway Company, because it did not consider it advisable to do so, but the Defendant company did eventually take a lease of the United Railway, going to show that the services performed by Mr. Bates, and for which he was hired, were all within the purposes for which this Defendant in Error was incorporated.

The contract of employment of Mr. Bates was not for any stated period of time. The Defendant in Error was at liberty to terminate it at any time, and the Plaintiff in Error was at liberty to cease his labors without even the formality of giving notice. Thus, the contract cannot be said to be an unusual or an uncommon one. Plaintiff in Error was merely employed to assist the Defendant in Error in developing this timber, for the reason that the officers of the Defendant in Error realized that the Plaintiff in Error was familiar with this property, knew its condition, its possibilities, was acquainted with all



the adjoining operators and could render them valuable services.

In Fletcher's *Cyclopedia of Corporations*, Vol. III, the authority of officers of a company is exhaustively treated, and it is said, Section 1906:

“As stated by Justice Marshall of Wisconsin, ‘Technically speaking, a corporation cannot act contractually, except by its board of directors, or their authority; but that has so many exceptions as to be of little use in practical affairs. A corporation may be bound by its custom of doing business. It may be bound by acquiescence; it may be bound by accepting and retaining the fruits of a transaction and in other ways without any action of its board of directors.’ The rule has also been well stated as follows: The duties of officers ‘may be prescribed or limited by the charter of the incorporation or by by-laws and regulations of the body corporate; but in the absence of specific limitations brought home to the knowledge of those who deal with them, or of which those who deal with them are bound to take notice, the officers of a corporation as its agents, are authorized to bind the corporation so long as they act within the ordinary scope of their duties. While the board of directors or trustees, or by whatever name it may be called, is the usual governing body of all private corporations and entitled to direct and control all its business, great or small, and to give direction to its other officers, yet the president and other officers, and not the board of directors, are those who are usually brought into contact with third parties

in the conduct of the business of the organization; and custom and usage, and the necessities of the social order, demand that these executive officers should be regarded as entitled to bind the organization in all matters which such organizations are accustomed to transact through such officers. This is elementary law in regard to corporations.' ”

And again, Section 2100 of this same authority, reads as follows:

“A provision in the charter that ‘the affairs of this corporation shall be managed and conducted by a board of directors,’ is common to all charters, and in no manner restricts or limits the implied power of the general manager to bind the corporation by any contract entered into by him for the company in the usual scope of his authority.”

And in Section 3202, it is said by this authority:

“Furthermore, the mere fact that a contract is unusual in its terms and without precedent so far as the particular corporation is concerned, does not necessarily preclude the authority of the manager to enter into it.”

And this same authority in this same section lays down the rule:

“If the general manager enters into a contract it will be presumed that he has authority to attend to and accept the manner of its performance in behalf of the corporation.”

Section 2102 lays down the rule:

“The general manager may make contracts which are in the ordinary course of the busi-

ness, especially where he had executed similar contracts before without objection."

It is not contended in this case that this property was to be held for speculation. The evidence discloses that it was purchased for the purpose of development and manufacture. This contract with Mr. Bates was primarily for the purpose of developing this property. All of the services rendered by Mr. Bates in the initial stages of his employment were directed toward the development of the property. It was only later that the question of the sale of a portion of the property came up for consideration, and during the later years of Mr. Bates' employment, instructions and orders came not only from Mr. Early and David C. Eccles, but also from other officers of the company at Ogden, Utah; and Mr. Early testified that he reported to the various officers and directors of the company at Ogden, Utah, during the later years of Mr. Bates' employment, and it is in evidence that during the negotiations for the sale of certain of this property, for which services Mr. Bates is seeking to recover, the negotiations were fully reported to the company's headquarters at Ogden, Utah, and considered by other members and officers of the company, all of whom were fully apprised as to the work which was being done by Mr. Bates.

Mr. Fletcher lays down the rule in Section 2098, that

"The test seems to be whether the act is within the ordinary business of the corporation.



If it is, then as already stated, the manager has power." "And this rule," states this author, "applies to all officers of a corporation who have the practical management of and are the active members of the corporation."

Here the evidence discloses that Mr. Early had for many years managed the affairs of the Eccles interests in the State of Oregon. He was the active member of the corporation. He looked after the interests and the property of the corporation. The President, David C. Eccles, came to Portland on numerous occasions and consulted with him, and Mr. Early testified that the President was advised as to Mr. Bates' employment and what Mr. Bates was doing. Furthermore, the evidence discloses that the President instructed Mr. Bates on a number of occasions and accompanied Mr. Bates during the time that he performed some of the services.

It is said in Fletcher's Cyclopedia, Section 2098:

"As a general rule, in the absence of express restrictions on his powers, with actual or constructive notice thereof to persons dealing with him, an officer or agent of a corporation, intrusted with the general management and control of its business, has implied authority to make any contract or do any other act which is necessary or appropriate in the ordinary business of the corporation." "The terms 'general manager' are words of large meaning. By giving such a title to its officers the corporation holds him out to the world as its managing agent, its alter ego, as the person having gen-

eral and supreme authority as the immediate representative of the directors in the conduct of the corporate affairs and in its dealings with the public. To allow a corporation to confer such a title upon one of its officers and thus hold him out to the world as possessing the large responsibilities and powers which are implied from his title, and then permit it to repudiate engagements into which he has entered within the scope of such implied powers, would be to sanction the perpetuation of a fraud; and this the courts will never do except under the stress of the most mandatory requirements of the law."

Again, it is said by this same authority in this same section:

"A 'general manager' without any limitations or restrictions as to his express authority has implied powers, it has been said, to do anything that the corporation could lawfully do in the general scope of its business."

Industrial and economical conditions are such that large corporations, some of them operating in every state of the Union with their home offices and their board of directors in a far-away city, must of necessity act through and by agents, and the general public ought not to be held to too strict a rule in dealing with agents who have been held out as the active members of the corporation.

Here we have a state of facts where Mr. Early had been in the employ of the Eccles interests, who were the owners of practically all the stock of the Defendant in Error corporation, for a period of

thirty years and over. A large portion of this time he had looked after their lumbering and logging interests in the State of Oregon. He had during that time entered into many contracts, assumed and discharged many obligations. He testified that no objection had ever been made to any of his acts.

In addition to this, we have the President of the company, who is the holder, as trustee, of practically all of the stock of the corporation, also acquiescing in the contract, and directing Mr. Bates in the performance of his labors. These two officers, stockholders and managing agents, as the evidence discloses, were the active and the only active officers of the corporation. Its property was all located in the State of Oregon. All that was necessary to be done in the handling of this property was done by these two officers. The company, it is reasonable to assume, directed them to handle this property and to look after it. It had been customary for them to do so in the past and there was no reason to believe that any different rule was followed in this particular case. The presumption, thus, is that these two parties, occupying the highest offices in the corporation, both of whom were members of the board of directors, had the authority to make the contract alleged by the Plaintiff in Error. There is no evidence in the case that Chas. T. Early or David C. Eccles did not have this authority, the presumption being that they did have this authority, and there being no notice to Plaintiff in Error, either active or constructive, or a lack of authority. Certainly it



was within the ordinary scope of the corporation's business to engage the Plaintiff in Error in this work. The contract with him could be terminated at any time, but having worked for this corporation for a period of three and a half years, much of his labor having been appropriated by the Defendant in Error, can it now be contended that this Defendant in Error is in a position to claim that its officers did not have the authority to enter into the said contract?

Section 2106, Fletcher, lays down the doctrine in regard to the employment of a broker, and enunciates the rule as follows:

“Authority to sell corporate property includes power to employ a broker to effect such sale, where that is the ordinary means of accomplishing a sale. So he may agree to pay a broker commissions to do an act within the authority of the general manager. He may employ a real estate broker, at the prevailing rate of commissions, to sell land unnecessary for the use of the corporation and which it was compelled to buy in at a foreclosure sale. The general manager of a fish company may employ brokers to sell fish, in advance of the opening market price for the season, where at about the then current price. The general manager of a land company may employ a person to sell lands on a salary and commission, or may agree to pay a certain sum per acre for all lands purchased by the corporation through negotiations initiated by the other party to the contract.”

It will be noticed from the testimony that the company authorized Mr. Early to sell this property, not at the initial stage of the employment of Plaintiff in Error, but later on. Mr. Early testified that he was in constant communication with Ogden by telephone, wire and by letter, and it is to be borne in mind that when Mr. Bates was employed he was not employed for the purpose of selling real estate. His employment was of a general nature and character. He was employed to assist the Defendant in Error company in developing and handling its property. He was subject to the orders of the officers and agents of the Defendant in Error company at all times, and his time and services were at the disposal of the Defendant, as he has alleged in the complaint.

A case often cited by the authorities is that of *Sun Printing Company vs. Moore*, 183 U. S. 642. Mr. Justice White rendered an exhaustive opinion. On page 651 the following rule is enunciated by the Supreme Court of the United States:

“It is well settled that the president or other general officer of a corporation has power *prima facie* to do any act which the directors or trustees of the corporation could authorize or ratify. The burden was on the Sun Association to establish that Lord did not possess the authority he assumed to exercise in executing the contracts.”

So, in this case, the President and the Manager of the company both, according to the evidence, employed the Plaintiff in Error. This would seem to

us to have made out a *prima facie* case and it was for the Defendant in Error to show want of authority in these officers to enter into this contract.

The rule, obviously, is different in the case of a contract with the ordinary subordinate agent of a corporation, and a contract with a vice president, manager, stockholder, director and president of a company, who have the active management of the corporation and who perform all the acts which the corporation performs. In such a case, when the evidence discloses that the contract was made with such an officer or officers, it becomes a matter of defense for the Defendant to show want of authority, the presumption being that such officers have the requisite authority to enter into the said contract.

There is in this contract no evidence to show that the Board of Directors did not authorize the employment of Mr. Bates. The evidence is silent as to what action the Board of Directors took in the matter, and certainly, when the record is in such a state, it is sufficient to take the case to the jury in the absence of other evidence rebutting it.

And, again, on page 652 of this same case, the Supreme Court of the United States says:

“If the corporation could have done these things, the agent having the broad powers possessed by Lord had a similar right.”

Lord, it will be noticed in this case, was the managing editor of the newspaper.



We submit that this Supreme Court decision sustains the contention of the Plaintiff in Error.

Again, in a recent case decided by the District Court of Columbia, *Russell vs. Washington Savings Bank*, Vol. 23, Appeal Cases, pages 398-407, in which the learned Justice makes the following observations:

“But while we fully concur with the learned justice who presided in the court below at the trial of this cause in most of his ruling, we find ourselves unable to concur in the view that there was no sufficient testimony to go to the jury on the question of the agency of George C. Ferguson, and his authority to bind the defendant bank in the transaction with the plaintiffs. Agency in such cases is usually proved by circumstances and by the apparent relations and conduct of the parties. A corporation can only act by agents, and its duly elected officers are within the scope of their respective duties, its agents to deal with third parties. Their duties may be prescribed or limited by the charter of the incorporation or by by-laws and regulations of the body corporate; but in the absence of specific limitations brought home to the knowledge of those who deal with them, or of which those who deal with them are bound to take notice, the officers of a corporation, as its agents, are authorized to bind the corporation to third parties so long as they act within the ordinary scope of their duties. While the board of directors or trustees, or by whatever name it may be called, is the usual governing body of all private corporations and entitled to direct and control all

its business, great or small, and to give direction to its other officers, yet the president and the other officers, and not the board of directors, are those who are usually brought into contact with third parties in the conduct of the business of the organization; and custom and usage, and the necessities of the social order, demand that these executive officers should be regarded as entitled to bind the organization in all matters which such organizations are accustomed to transact through such officers."

"Now, that the president of a bank is its chief representative and entitled to act as its general agent in the transaction of its business cannot be questioned. That among the things which he can undoubtedly bind his bank is the employment of counsel to appear for it and defend its interests in pending or prospective litigation, is a proposition which seems to receive the unqualified approval of counsel on both sides of this case."

Now, it is to be remembered that the Defendant in Error company purchased this timber for the purpose of manufacturing it into lumber. The thing that the President and the Managing Agent and Vice President were called upon to do was to carry out this purpose. In carrying out this purpose they had a right to employ the Plaintiff in Error to assist in doing it. That was the object of the company. It was the ordinary purpose for which it was formed. In the later stages of the Plaintiff in Error's employment, it was desirous of selling a portion of the company's property or a portion of its stock, and

eventually all of it was sold, but it is to be remembered that when the time for the sale of the property came up the other officers and the Board of Directors were fully advised as to what was being done. In fact, the Defendant in Error acted upon and consummated a number of the contracts that the Plaintiff in Error was instrumental in securing. The Board of Directors and the company consummated the contract for the lease of the United Railway Company. The Board of Directors and the company consummated the sale of the property to the Central Coal & Coke Co. It is in evidence here that in many of the other transactions for the sale of property, such as to the Inman-Poulsen Lumber Company and the Kerry Timber Company, the other officers, agents and directors of the Defendant in Error company were fully apprised and acted, giving directions, and in the Inman-Poulsen Lumber Co. contract which was originated by the Plaintiff in Error, the company acted upon it, consummated it and Mr. Bates, the Plaintiff in Error, secured his pay upon that particular transaction. Not from the Defendant in Error, it is true, but from the purchaser, but the manner of the payment was merely a matter of detail.

Again, in the case of *Chilcott vs. Washington State Colonization Company*, 45 Wash. 148-152; s. c. 88 Pac. 113, the Supreme Court of Washington uses the following language:

“The appellant further contends that error was committed in permitting the respondent



Grabowski to testify that Harding had admitted to him that he, Harding, and Chilcott had agreed on twenty-five cents per acre as compensation for the respondents. It is conceded that Harding was at different times trustee, treasurer, and manager of the corporation. This being true, he was not an agent of restricted authority, but one exercising broad and general powers. A corporation acts only through its officers, managers, and agents, and it is a well-established rule of evidence that it is bound by the admissions of its agents or managers while engaged in the discharge of their duties. The evidence here shows that the respondents were endeavoring to secure an agreement as to the amount of their compensation. They both conferred with Harding for that purpose. By their testimony they claim that Harding first agreed with Chilcott, and immediately, or shortly thereafter, restated such agreement to Grabowski; who expressed satisfaction therewith. If Harding, as general manager, was not entitled to make contracts for the appellant, fixing compensation to be paid, it would be difficult to understand who could do so. His act was that of the corporation, and his statements made to Grabowski under these circumstances were sufficiently a part of the *res gestae* to render them admissible as against the appellant. Elliott, Evidence, p. 252."

In the case of Kitzmiller vs. Pacific Coast & N. Packing Co., 90 Wash. 357-363; s. c. 156 Pac. 17, this same Court used the following language:

"That Kildall had no express or implied authority to enter into the transaction complained

of cannot be sustained upon reason or authority. As 'general manager' without any limitations or restrictions as to his express authority, he had implied authority to do anything that the corporation could lawfully do in the general scope of its business. *Harvey vs. Sparks Brothers*, 45 Wash. 578, 88 Pac. 1108; *Saunders vs United States Marble Co.*, 25 Wash. 475, 65 Pac. 782; *Chilcott vs. Washington State Colonization Co.*, 45 Wash. 148, 88 Pac. 113; *Citizens' Nat. Bank of Tacoma vs. Wintler*, 14 Wash. 558, 45 Pac. 38, 53 Am. St. 890; *Waldron vs. Canadian Pac. R. Co.*, 22 Wash. 253, 60 Pac. 653. It assuredly was as much the corporate business of the company to sell as to catch and pack its products."

The evidence discloses that long before any of the sales of any of the property set forth in the complaint herein, and long before what is known as the Inman-Poulsen, Kerry and Central Coal & Coke deals were initiated, Mr. Early attended meetings of the Board at Ogden, Utah.

The Plaintiff in Error, who seeks to recover for services rendered in the Kerry deal and the Central Coal & Coke deal, had received instructions from Mr. Early regarding these deals, after Mr. Early had attended the meetings of the Board of Directors. Not only this, but the evidence discloses that Mr. Early had been reporting to the people at Ogden quite regularly and this was particularly so during the final stages of Mr. Bates' employment.

The question was asked Mr. Early:

"In reporting as you did to J. M. Eccles the result of that transaction" (referring to the Inman-

Poulsen transaction) "you were making a report then to the representatives at Ogden of the transactions that had been carried on in the sale of a portion of their timber holdings to the Inman-Poulsen Lumber Company, were you not?"

A. Yes, I was completing a report; it was a daily report made by telephone or telegraph."

Also, Mr. Early testified in answer to a question from Defendant in Error's counsel:

"You instructed me to go to San Francisco and see what I could do and then to exhaust every resource to dispose of this property—that you had to do something, you had to have money."

It is true that in the initial stages of Plaintiff in Error's employment, Mr. Early testified that he did not report to anyone except the President, but it is also to be borne in mind that Mr. Early and Mr. Eccles were the active officers of the Defendant in Error corporation; that Mr Eccles lived in Ogden, the home office of the corporation, the place where its Board of Directors sat and acted, if they did act at all. There is no evidence here contrary to what might reasonably be supposed to happen that the President reported to his company and kept it fully advised. Certainly, the knowledge to the President ought to be considered the knowledge of the company. The Board of Directors, in many corporations, seldom meet and it would seem to be too harsh a rule that before a corporation can be bound by a knowledge of its affairs, such knowledge must come to its Board of Directors.



Mr. Early also testified that he reported by telephone and telegraph to the home office at Ogden, from one to three times a day.

The evidence discloses that this timber was originally intended to be bought for the Oregon Lumber Company, but a new corporation was formed to take it over. It is also in evidence that the Oregon Lumber Company and the Oregon-American Lumber Company, the Defendant in Error, are affiliated companies, their officers and stockholders interlocking.

And Mr. Early testified in regard to his relations with these companies and stockholders, that during the thirty-three years of his employment for these interests, none of his transactions had ever been questioned or repudiated. During much of this time he occupied the highest executive positions in the company. After Mr. Early's resignation, Royal Eccles, who is an attorney and was the Secretary of the Defendant in Error as well as the Oregon Lumber Company, from both of which companies Mr. Early resigned, sent to Mr. Early a resolution of the Board of Directors commending Mr. Early for his faithful services as Vice President and General Manager of the company covering thirty-three years of continuous service. This resolution purports to be acquiesced in by the stockholders as well as the directors.

In the letter of Royal Eccles, who was Secretary of both companies, Mr. Eccles calls attention to the

fact that Mr. Early had attained "many of the most important executive responsibilities in the management of the company."

The fact remains that Mr. Early had always managed the affairs of the Defendant in Error and its affiliated companies in the State of Oregon for many past years. The company had turned over to Mr. Early the management of the Defendant in Error and its interests. He was a general officer and a general agent. No limitations are presumed in the case of such an agent. The Plaintiff in Error, spending three and a half years of his time working for this company and its interests, dealing with Mr. Early, whom he believed certainly had authority to employ him, should not now be denied to have his case submitted to the jury, particularly after the Defendant in Error has received the fruits of his labor.

In the case of *Aerne vs. Gostlow*, 60 Ore. 113-121, the Supreme Court lays down the rule:

"Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general."

Again, in the case of *Rae vs. Heilig Theatre Co.*, 94 Ore. 408-412, the Supreme Court of the State of Oregon lays down the rule that whether or not an agent is authorized to make an employment is a question of fact for the jury, and uses the following language:

"With the conflict in the testimony we have nothing to do. The statement of the president

of the company could fairly be construed by the jury as indicating that the services of the plaintiff were accepted and acted upon by the corporation. The testimony of the president also signified that James C. Heilig was authorized to act for the company in the matters of its accounts. Therefore the evidence of the authority of the agent of the company does not rest alone upon the declaration of such agent.

“Corporations can only act through their officers and agents. The power of such representatives of a corporation to bind the corporation is governed by the general law of agency, the underlying principles being the same. Their authority may be implied from their conduct and the acquiescence of the directors: 7 R. C. L. 620, p. 616. If, as the testimony purported, James C. Heilig was the agent of the defendant, and as such employed the plaintiff as a public accountant to perform services for the defendant which the corporation approved, and accepted the benefits of, then it cannot avoid that part of the arrangements made by the agent imposing a responsibility connected therewith upon the defendant. As said by Mr. Commissioner King, in *McLeod vs. Despain*, 49 Ore. 536, at page 563 (92 Pac. 1088, at page 1091, 124 Am. St. Rep. 1066, 19 L. R. A. (N. S.) 276):

“‘It is too well settled to admit of serious discussion that the principal must adopt or reject the act of his agent as an entirety, and cannot receive the benefit of such agency without bearing its burdens,’ citing: *Coleman vs.*



Stark, 1 Ore. 116; La Grande Nat. Bank vs. Blum, 27 Ore. 215 (41 Pac. 659).

“Persons dealing with a known agent have a right to assume, in the absence of information to the contrary, that his agency is general: *Aerne vs. Gostlow*, 60 Ore. 113 (118 Pac. 277). The testimony indicated that James C. Heilig customarily incurred and liquidated expenses for the company in matters pertaining to its affairs. It is well settled that when, in the usual course of the business of a corporation, an officer or agent has been allowed to manage certain of its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. The usual employment is evidence of the powers of an agent, and the principal is bound by the acts of his agent within the apparent authority conferred upon such agent: *Martin vs. Webb*, 110 U. S. 7 (28 L. Ed. 49, 3 Sup. Ct. Rep. 428; see, also, *Rose’s U. S. Notes*). The primary object of a corporation in employing an agent is that he shall be enabled to accomplish the purposes of the agency, and other persons are invited to deal with the agent with that understanding: 7 R. C. L. 623, par. 620.”

The jury might well have reached the conclusion that Chas. T. Early and the President, David C. Eccles, had authority to employ the Plaintiff in Error. Not only this, but the jury might well have found that since the Defendant in Error had received the fruits and benefits of Plaintiff in Error’s

labor, that it was obligated to assume the liabilities. The question of implied power and express powers were both for the jury.

In the case of *West vs. Washington Railway Co.*, 49 Ore. 436-445, the Supreme Court lays down the following rule:

“It is admitted by the pleadings that the defendant, at the time of the agreement, held title to the premises, subject only to the mortgages thereon; that McCabe at that time was its vice president and general manager; that the written lease was executed by him in that capacity; that he received \$100 under the parol agreement, and placed plaintiff in possession of the lots. He also admits that he was its general manager, and, as such, offered to dispose of its realty. No attempt having been made to show that he was acting outside of his duties as such manager, it will be presumed that he was acting within the scope of his agency in the dealings had with plaintiff. When McCabe testified that he was general manager, he thereby gave evidence that he was agent for the company in all its dealings. In effect he became, in his dealings with the public, the corporation itself.”

And the Supreme Court in this same case, on page 446, on the question of ratification, says, after stating that the corporation has received the fruits of the agent's efforts:

“These circumstances, taken together with the conceded fact that the money was paid to him, by him turned over to and retained by the company, are sufficient to manifest at least a

ratification of his acts, and inevitably leads to the conclusion that he had full authority to bind defendant.”

In the case of *Pettibone vs. Lake View Town Company*, 134 Cal. 227-228, the Supreme Court of California uses the following language:

“The contract is in writing, and is set out in full in the findings. It constituted the plaintiff its exclusive agent for the sale of lands in the counties of Riverside, San Bernardino, and Los Angeles, on a salary of seventy-five dollars per month and certain commissions, the term of service to be three months, commencing December 1, 1897, and to continue thereafter until terminated by a sixty-days’ notice, in writing, by either party to the other.

“The principal question relates to the execution of the contract by the corporation. It is signed thus: ‘Lake View Town Company, by F. E. Brown, President.’

“The court found that no resolution was passed by the directors of said corporation authorizing the execution of said contract; that the matters and things contained therein are all authorized by the articles of incorporation to be done and performed by said corporation, and are matters within the ordinary course of its business” \* \* \* \*

“No intimation is given that any objection was made by the board of directors, or by any one, to the contract in question, or to any of the acts of the president in the conduct of the business of the corporation. That the president of this corporation had the power to bind it by the



contract in question is sustained by *Crowley vs. Genessee Mining Co.*, 55 Cal. 273; *Streeten vs. Robinson*, 102 Cal. 542, and *Bates vs. Coronado Beach Co.*, 109 Cal. 162. For numerous cases in other jurisdictions which cite and follow *Crowley vs. Genessee Mining Co.*, 55 Cal. 273, see 3 Notes on California Reports, under that case."

The Supreme Court of Kansas, in the case of *Atlantic & Pacific Rld. Co. vs. John C. Reisner*, 18 Kans. 458-460, uses the following language:

"The testimony however, brief as it is, discloses the fact that Hyde was the *general agent* of the company. We cannot ignore this evidence. Upon it rests the liability of the plaintiff in error. The power and authority of the *general agent* of a railroad company is much greater than that of a station agent. In the case of a general agency, the principal holds out the agent to the public as having unlimited authority as to all his business. When the witness testified that Hyde was the general agent of the road at Atchison, he thereby gave evidence that the railroad company held out to the public such person as its agent in all its business and employment. In other word, the general agent of the company is virtually the corporation itself."

We respectfully submit that in view of the long period of time that Plaintiff in Error performed services for the Defendant in Error, a period of three and a half years, during all of which time he was constantly in conference with the active members of the corporation and during a large part of

the time other members of the Defendant in Error corporation were fully advised, together with the further fact that the home office was, during much of this time, fully apprised of what was being done, taken in connection with the further fact that the Defendant in Error acted upon and consummated contracts and agreements which the Plaintiff in Error was instrumental in securing, that the evidence in this case is amply sufficient to warrant this case being submitted to the jury, it being a general rule that if there is any substantial evidence from which a jury may find a fact, it then becomes a question for the jury and not the Court.

Respectfully submitted,  
WILBUR, BECKETT & HOWELL and  
F. S. SENN,  
Attorneys for Plaintiff in Error.





IN THE

**United States Circuit Court  
of Appeals for  
NINTH CIRCUIT**

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PAUL C. BATES,

Plaintiff in Error,

vs.

OREGON-AMERICAN LUMBER COMPANY,

a Utah Corporation,

Defendant in Error.

---

**Brief of Defendant in Error**

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UPON WRIT OF ERROR TO THE UNITED STATES  
DISTRICT COURT OF THE DISTRICT OF OREGON

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UPON WRIT OF ERROR TO THE UNITED STATES  
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The original complaint in this action was based on a single alleged transaction, being the transaction set forth in paragraph 16 of the second amended complaint. By leave of Court the plaintiff in error amended his complaint and alleged in substance that on July 1, 1917, defendant in error became the owner of 27,331.31 acres of timber lands in Oregon, was desirous of developing the same and securing transportation facilities and of marketing the timber thereon and that in August following it entered into a contract with plaintiff in error whereby he was employed to look after the property, to assist in marketing the timber thereon, in devising ways and means of securing the best possible returns from said property, and contracted and agreed to pay him for his services and to reimburse him expenses in carrying out and performing the services agreed upon; that he immediately entered upon the work of his employment and at all times held himself in readiness to perform and his services were at the disposal of the defendant in error.

He then set out in paragraphs 5 to 19 inclusive fifteen different transactions in which he alleges he performed services and incurred expenses under the alleged contract of August, 1917. These alleged transactions cover a period from August 6, 1917, to November, 1920.

Defendant in error filed a motion to strike this amended complaint on the ground that it pleaded fifteen separate causes of action which were not separately stated but were pleaded as a single cause of action. This motion was denied by the court. Thereupon the defendant in error filed a motion that plaintiff in error be required to elect whether

he would rely on a quantum meruit or on an express contract. This motion was also denied.

The defendant then filed a demurrer to this amended complaint, as follows:

"Comes now the above-named defendant, the Oregon-American Lumber Company, by its undersigned attorneys, and demurs to the amended complaint of the plaintiff filed herein on the following grounds, to-wit:

First. That the plaintiff has not the legal capacity to sue on the grounds and for the reason that the amended complaint of the plaintiff shows on its face that the plaintiff is a real estate broker and has not alleged in his amended complaint that he had a license to act as such real estate broker, as is required by the laws of the State of Oregon.

Second. That the amended complaint of the plaintiff, does not state facts sufficient to constitute a cause of action.

DeVINE, HOWELL, STINE & GWILLIAM,  
and W. A. MUNLY.

Attorneys for the Defendant, Oregon-American  
Lumber Co."

This demurrer was overruled, and defendant in error filed its answer in which it admitted that appellant was a citizen and resident of Oregon; that defendant in error was a corporation formed under the laws of Utah, and domiciled in that State, but licensed to do business and was doing business in the State of Oregon; that on July 1, 1917, it became the owner of 27,331.31 acres of timber lands in

Columbia, Clatsop and Tillamook Counties, Oregon, for which it paid \$3,650,000.00, and which was undeveloped, with no transportation facilities and that it was and is valuable chiefly for its standing timber; that it was desirous of developing said timber lands, and of securing transportation and marketing the timber thereon, and denying that it ever entered into any contract with plaintiff in error and denying generally or specifically all the other allegations of said amended complaint as to any services rendered to defendant in error by plaintiff in error and as to any expenses incurred by him at the request or on behalf of defendant in error.

This answer then set up certain affirmative defenses in substance:

(1) That plaintiff in error, at all times mentioned in the amended complaint was a real estate broker, but had not secured any license to do business as such;

(2) That at no time was there any contract or memorandum in writing signed by defendant in error or any person authorized to make any contract on its behalf, employing or authorizing plaintiff in error to sell or purchase any real estate or any interest therein as agent for defendant in error for compensation or commission; or to sell or purchase, or to negotiate the sale or purchase of any real estate or any interest in real estate or other property; or to sell or negotiate the sale of any lands or other property of defendant in error, or to do anything which plaintiff in error in said amended complaint alleges that he did under the alleged contract of August, 1917.

(3) That at all times mentioned in said amended complaint defendant in error was a corporation organized and existing under the laws of Utah, with a board of five directors, and that its articles of incorporation do not provide for the sale or other disposition of the property of the corporation, by its board of directors or other officers of the corporation, and that no officer or agent of defendant in error had any authority to make on its behalf the contract or contracts of hiring or employment or any of them, set out in said amended complaint, or to make any contract with plaintiff in error for the sale of or negotiating for the sale, purchase or lease of any lands or other property on behalf of defendant in error, and that no such contract had ever been made by its board of directors or with their knowledge or consent.

(4) That defendant in error was not at any time authorized, by law or its articles of incorporation to make any contract by which it would be liable for any commission or compensation to the plaintiff in error for the sale of any of the stock of its stockholders.

(5) That none of its officers or agents were at any time authorized to employ plaintiff in error to secure purchasers for, or to dispose of the capital stock of its stockholders and that the corporation and its officers were without power to employ the plaintiff in error to sell any of the stock of its stockholders.

The plaintiff in error filed a reply denying the affirmative allegations of the answer and pleading that all the matters and things set forth in his amended complaint were known to the directors, officers and agents of the



defendant in error, and that such officers and agents permitted its officers and agents at Portland, Oregon, to hold themselves out to be fully clothed with power to represent defendant in error in all matters and things set out in the amended complaint, and referred to therein.

By this appeal, the question presented is, was the verdict in favor of defendant in error properly directed by the trial court? It was, provided that:

1. The second amended complaint fails to state a cause of action; or

2. If the evidence offered by plaintiff in error was insufficient to show that Chas. T. Early was authorized to make, on behalf of defendant in error the contract which plaintiff in error alleges was made between him and the defendant in error in August, 1917.

We propose to discuss these questions in their order.

The insufficiency of the complaint can of course be raised at any time, even on appeal, and therefore if it does not state a cause of action, the verdict was properly directed without regard to the sufficiency of the evidence to prove the authority of Early to bind the defendant in error by the alleged contract.

An examination of the second amended complaint discloses the fact that in all of the paragraphs wherein the services alleged to have been performed are set out, except paragraphs 16 and 19, the services alleged to have been performed consisted of negotiating for the purchase, sale or leasing of real estate, and in those two paragraphs he

claims for negotiating for the sale of capital stock, which services extended over more than three years of time, and for which services plaintiff in error claims compensation.

The complaint therefore fails to state a cause of action:

First—Because it shows on its face that plaintiff in error was at all the times mentioned therein engaged in the business of a real estate broker both under the common law and under the statutes of Oregon, and there is no allegation that he had obtained a license as such broker, as required by Sections 8309 to 8316, inclusive, of Olson's Oregon Laws.

Sec. 8309 Olson's Oregon Laws defines a real estate broker as "a person engaged in the business of negotiating or offering to negotiate for others for compensation or profit either directly or indirectly—"the purchase, sale, exchange, lease or rental of real estate or any interest therein as his principal or partial vocation."

Sec. 8310—Declares it to be unlawful for any person to engage in the business of real estate broker without first obtaining a license.

Sec. 8315—Makes it a misdemeanor punishable by fine for any person to engage in the business of real estate broker without having a license.

Sec. 8316—Provides that no person engaged in the business of real estate broker without a license can maintain any action in the courts of Oregon, for the collection of compensation for negotiation of a purchase, sale, exchange, lease or rental of real estate.

This last section alone would not prevent the maintenance of such an action in the federal courts, but where, as here, the statute declares it unlawful and fixes a penalty for the doing of certain things, a contract to do such prohibited things is void even though not so declared by the statute.

Holt vs. Green, 73 Pa. St. 198; 13 Am. Rep. 737.

Brooks vs. Cooper 50 N. J. Eq. 761; 35 Am. St. Rep. 793.

American etc. Exchange vs. Blunt, 102 Me. 138; 66 Atl., 212; 120 Am. St. Rep. 463; 10 L. R. A.-N. S. 414.

Woods vs. Armstrong 54 Ala. 150; 25 Am. Rep. 671.

Randall vs. Tuell 89 Me. 443; 36 Atl. Rep. 910.

Harding vs. Hagar, 60 Me. 340; 63 Me. 515.

Thomas vs. Birmingham etc. Co. 195 Fed. 340.

Dudley vs. Collier, 87 Ala. 431; 13 Am. St. Rep. 55.

It is true that the contract sued on is alleged to have been made prior to the enactment of the foregoing provisions of the Oregon Statutes, but a contract valid when made may become invalid by subsequent legislation.

Woods vs. Armstrong, 54 Ala. 150; 25 Am. Rep. 671.

American etc. Exchange vs. Blunt, Supra.

Mottley vs. Louisville & N. R. Co., 219 U. S. 478.

There can be no vested right to do wrong, hence

a law prohibiting the doing of that which is injurious to the health or morals of the public or inimical to the public welfare, does not impair the obligations of a contract which but for the law would be valid.

120 Am. St. Rep. 468 Note & Cases cited.

The complaint does not allege that plaintiff in error at any time had a license as a real estate broker.

It follows, that since plaintiff in error had no license as a real estate broker, any pursuit of that business after the passage of the act of 1919, on the subject, would be unlawful and for any services as a real estate broker rendered after that time he could not recover in any action.

Luce vs. Cooke, 227 Pa. St. 224; 75 Atl. Rep. 1098.

Stevenson vs. Ewing, 87 Ten. 46; 9 S. W. 230.

Hustis vs. Picklands, 27 Ill. App. 271.

Reeder vs. Jones, 65 Atl. 571 (Del.).

Riley vs. Chambers, 181 Calif. 589; 185 Pac. 855.

Johnson vs. Hulings, 103 Pa. St. 498; 49 Am. Rep. 131.

See also Page on Contracts §691.

And since plaintiff in error has elected to treat the contract as entire and indivisible, he cannot recover in this action, even conceding that he might have recovered for services rendered prior to the passage of the statute we have quoted, if he had treated the several items of service so performed as a separate cause of action and brought his action accordingly.



Burke vs. Child, 21 Wall. 441; 22 L. ed. 623.

Meguire vs. Corwine 101 U. S. (11 Otto 108) 25 L. Ed. 899.

Hazelton vs. Sheckels 202 U. S. 71; 50 L. Ed. 939.

Cleveland etc. R. Co. vs. Hirsch, 204 Fed. Rep. 849.

Mann vs. Brady (Okl) 196 Pac. Rep. 346.

Douthart vs. Congdon 197 Ill. 349; 64 N. E. Rep. 348,

is a case directly in point. We quote the syllabus.

“Where a city ordinance prohibited brokers from transacting business without a license, and provided a fine for a violation thereof, a note given to brokers in settlement of business transacted by them for the maker, which included charges for services when the broker had acted without a license, is absolutely void, though such charges constituted a small part of the consideration, and was an ascertained amount, the illegality vitiating the whole consideration.”

Kimbrough vs. Lane 11 Bush (Ky.) 556.

Wagner vs. Bierning, 65 Tex. 506.

Snider vs. Willy, 33 Mich. 483.

Many other cases might be cited, but we deem it unnecessary as there is really no contrariety of opinion on the subject.

The plaintiff in error having sued to recover \$234,002.13, on a single cause of action, as he has elected to treat it, and a great portion of the amount claimed, being claimed

for alleged services which were rendered in violation of the laws of Oregon, the entire transaction is tainted with illegality, and this appearing on the face of the complaint no cause of action is stated, and the demurrer of defendant in error should have been sustained and a verdict for defendant in error was properly directed.

Second: Another reason why the second amended complaint is fatally defective and states no cause of action is that:

The statute of Frauds of Oregon, Section 808, Olson's Oregon Laws, provides as follows:

In the following cases the agreement is void unless the same or some memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent:

"8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for a compensation or commission; provided, however, that if the note or memorandum of such agreement be in writing and subscribed by the party to be charged, or by his lawfully authorized agent, and contains a description of the property sufficient for identification, and authorizes or employs the agent or broker named therein to sell such property, and expresses with reasonable certainty the amount of the commission or compensation to be paid such agent or broker, such agreement of authorization or employment shall not be void for failure to state a consideration."

Under that portion of Section 808, which we have quoted any and every agreement authorizing or employing an agent or broker to sell or purchase any real estate for a *compensation* or *commission* which is not in writing and subscribed by the party to be charged is absolutely void. And even if such an agreement is in writing the consideration must be expressed therein and such memorandum so signed must contain a description of the property sufficient for identification, and must authorize or employ the agent or broker named therein to sell such property, and must express with reasonable certainty the amount of commission or compensation to be paid to such agent or broker.

We are not unmindful of the rule that the party pleading a contract which comes within the purview of this statute, need not allege that such contract was in writing, but that rule does not relieve the pleader of the necessity of pleading the terms and conditions of the contract. If the contract pleaded in this case, is one whereby defendant in error employed plaintiff in error to purchase or sell any real estate and was in writing, to be valid it must have expressed the consideration for the contract or must have contained a description of the property, and by its terms have authorized the plaintiff in error to purchase or sell the property described and must have expressed with reasonable certainty the commission or compensation to be paid to him for effecting such purchase or sale. In an action on such a written contract, the contract must be set out in the complaint or its legal effect must be pleaded. It would therefore be necessary to allege the employment, the authority to sell or purchase, the description of the property to be purchased or sold and the commissions or

compensation to be paid. A complaint alleging that the parties entered into a written contract whereby the defendant employed the plaintiff to purchase or sell real estate, without setting out the contract, or alleging the consideration therefor, or setting out a description of the property and alleging that the plaintiff was authorized to purchase or sell the same, and the amount of commission to be paid would state no cause of action. And of course, while it need not be alleged that the contract was in writing, that is so because it will be presumed that the contract was a valid one, or in other words that it was in writing. It does not relieve the party from alleging any other essential facts. It would be absurd to say that where the contract is alleged to be in writing, the facts essential to its validity, that is, the consideration therefor, the description of the property, the authority of the agent or broker and the commission or compensation to be paid, must be alleged, but that where the contract is not alleged to be in writing, and therefore is only presumed to be so, it is not necessary to plead the essential facts above named, which must exist under the statute in order to constitute a binding contract. This presumption only takes the place of an allegation that the contract was in writing.

Although it will be presumed that the contract was in writing, to entitle plaintiff to recover he must allege and prove the facts essential to such a valid contract, and the proof must be made by a written instrument.

It is alleged in the second amended complaint, that immediately after the defendant in error purchased the timber land mentioned in said complaint, the plaintiff in



error was employed by defendant in error to aid in developing and marketing said property. To market the property would of course be to sell it. The complaint, however, nowhere describes the property, nor does it allege with reasonable certainty or at all the commission or compensation to be paid to appellant. On the contrary it simply alleges that defendant in error agreed to pay plaintiff in error for his services and to reimburse him for his expenses. Then in paragraphs 5 to 19 inclusive he sets out the various items of services and expenses for which he seeks to recover.

It will be observed that all of these alleged transactions except those mentioned in paragraphs 16 and 19 involve negotiations for the purchase or sale of real estate, and those two involve negotiations for the sale of capital stock of the defendant in error company. Now it is claimed and alleged that the services rendered in each instance were rendered in pursuance of the contract of August, 1917. There is no averment that any contract was entered into subsequent to and independent of that contract. In none of these various instances except in paragraphs 18 and 19, is there any allegation as to the amount of the commissions or compensation to be paid, and in none of them is the property to be sold or leased described so that it could be identified.

It is settled beyond cavil by the decisions of the Supreme Court of Oregon, that under subdivision 8, of Section 808, the alleged contract involving as it did the purchase and sale of real estate, must not only have been in writing but must also have contained a description of the

property and must have expressed the amount of commissions or compensation to be paid.

Oregon Home Builders v. Crowley, 87 Ore. 530, 170 Pac. 718.

In the case cited, in discussing the question of the necessity of the amount or rate of commission being stated in writing, Mr. Justice Harris, speaking for the Court, says:

“The difference between the views expressed by courts of other jurisdictions as well as the expressed statutory requirements in some of the states, only illustrate the real difficulties that may arise out of seemingly plain statutes like subdivision 8 of Section 808, L. O. L. However, all further debate in this state is foreclosed by this court speaking through Mr. Justice Benson in Taggart v. Hunter 78 Ore. 139; 150 Pac. 738; 152 Pac. 871; where after exhaustive presentation by learned counsel and a careful consideration of all phases of the question, it was concluded that if the writing is silent upon the amount of the commission to be paid, it fails to satisfy the statute of frauds. Subdivision 8 was designed as a remedy for a two-fold evil; (1) brokers claiming commissions when they have never been authorized to sell; and (2) brokers claiming excessive rates although authorized to sell. The conclusions reached in Taggart v. Hunter, that the writing must state the amount or rate of commission to be paid, is justified by the history and purpose of the statute.”

This construction of Subdivision 8, of Section 808, of the laws of Oregon is, of course, binding on the Federal Courts.

Beckwith v. Clark, 188 Fed. Rep. 171;  
 Traer v. Fowler, 144 Fed. Rep. 810;  
 Walker v. Hafer, 170 Fed. Rep. 37;  
 Lloyd v. Fulton, 91 U. S. 485; 23 L. Ed. 363;  
 Hairston v. Danville, 208 U. S. 598; 52 L. Ed.

637.

In no instance where plaintiff in error is claiming a commission or compensation for negotiating for the purchase or sale of any real estate or interest therein, except in paragraphs 18 and 19, is there any averment in the complaint as to the rate or amount of commission or compensation to be paid and in no instance is there any allegation describing the property.

There being no written contract, nor any contract expressing the rate or amount of commission to be paid, there can be no recovery on account of any of the alleged negotiations for the purchase or sale or leasing of any real estate, for there can be no recovery upon quantum meruit.

Lueddeman v. Rudolf 79 Or. 258, 154 Pac. 116;  
 155 Pac. 172;

Oregon Home Builders v. Crowley, 87 Or. 530;  
 170 Pac. 718;

Leimbach v. Regner, 70 N. J. Law, 608; 57 Atl.  
 138;

Cushing v. Monarch Timber Co., 75 Wash. 678;  
 135 Pac. 660;

Paul v. Graham, 193 Mich. 447; 160 N. W. 616;

Weatherhead v. Cooney, 32 Idaho 127; 180 Pac.  
 760.

Fortunately, for our purposes, there is a full discussion and annotation of this matter in 17 American Law Reports,

page 891. It will be seen that the only case in which there is a discordant note is that of *Seifert v. Dirk*, 184 N. W. Rep. 698 (Wisconsin), and in that case three of the Justices united in a dissenting opinion.

The annotation on page 891, 17 A. L. R. lays down the established principle as follows:

“A broker cannot recover for his services in buying or selling real estate upon a quantum meruit where his contract was not in writing, when that is required by the statute in relation to brokers.”

In support of this, decisions from California, Idaho, Indiana, Michigan, Nebraska, New Jersey, Oregon, Utah, and Washington are cited and the statute is given in each case.

The reason for the rule and decisions is stated by a number of the courts that to permit a recovery on a quantum meruit would be practically to nullify and defeat the purposes of the statute.

Some of the reasons given by the courts as stated in the above note, are as follows:

“In *Leimbach v. Regner* (1904) 70 N. J. L. 608, 57 Atl. 138, supra, the court said: ‘The plaintiff, however, claims to recover on a quantum meruit. This is a mere attempt in this case to evade the statute.

“‘To permit a recovery upon the quantum meruit or upon an implied contract would be to defeat the purpose of the statute, and supply by implication a contract which the statute expressly says



may only be proven by written evidence." *Cushing v. Monarch Timber Co.* (1913) 75 Wash. 678, 135 Pac. 660, Ann. Cas. 1915C, 1239.

In *Paul v. Graham* (1916) 193 Mich. 447, 160 N. W. 616, the court said, referring to the amendment to the Michigan statute: "It has been the rule of this court to permit recoveries for services actually performed under contracts void under the Statute of Frauds, either at the contract price or under a quantum meruit \* \* \* \* If this rule is to be made applicable to this section of the Statute of Frauds, it would practically nullify the effect of the statute. Demands for commissions by real estate brokers are not usually made or pressed until the contract is performed. This being so, a recovery could be had, in nearly every instance, either at the contract price or under the quantum meruit. In order to give the act the effect which the legislature evidently intended it should have, we have decided to hold that no recovery can be had under this section unless the agreement therefor is in writing. This is in accord with the holding of other courts which have construed similar statutes."

In *Weatherhead v. Cooney* (1919) 32 Idaho 127, 180 Pac. 760, *supra*, the court said: "Though we recognize the distinction between void and voidable contracts, we are, nevertheless, unable to see why recognition of the right to recover under the oral contract alleged herein, or under a quantum meruit for the reasonable value of services rendered by the appellant herein, would not completely abrogate the statute."

See also *Selvage v. Talbot*, 95 N. E. 114 (Ind.), 33 L. R. A. (N. S.) 973 and note; *Thomas V. Birmingham etc. Co.*,

195 Fed. Rep. 340.

Coming to Oregon, in *Lueddemann v. Rudolf*, 79 Oregon, p. 258, 155 Pac. 174, we find the following from Justice Burnett, delivering the opinion of the court:

"The deduction is that in Oregon, under the present state of the law, there can be no implied contract to pay a commission to a real estate broker. Unless he has an express contract complying with the statute of frauds, he is as helpless in his effort to recover compensation at law as though he endeavored to prove a conveyance of land without a deed, or a bequest without a will."

And further on page 259, of the State Report, page 174 of the Pacific Reporter, the decision says:

"The statute was designed as a protection against importunate and unscrupulous real estate agents who thrust themselves upon anyone having realty for sale and claim commissions under any and all circumstances. Tacked as it was to the statute of frauds, it is a very drastic measure, and in this instance it may have operated harshly upon deserving men; but we cannot disregard the plain words of the law. The only relief from it must be found in a change of the legislative enactment by that department of the government."

These citations show the policy of the statute such as exists in the state of Oregon as declared by the courts.

We contend, therefore, under that statute, and under the decisions of the courts, including the *Lueddemann Ru-*

dolf case, by the Oregon Supreme Court, there can be no recovery on a quantum meruit.

We have shown hereinbefore that no recovery can be had on an express contract, unless the contract expresses with reasonable certainty the amount of the compensation or commission, and now we have demonstrated on the strength of the overwhelming weight of authority, sustained by the reasons that induced the legislatures to enact such laws, that no recovery can be had on a theory of quantum meruit. So either way this contract may be viewed, it is under the ban of the Statute of Frauds and is void.

*If part of an entire contract is void under the Statute of Frauds, it is void in toto.*

The claim may be made, however, that part of the alleged services set forth in the plaintiff's amended complaint, do not concern an interest in real estate, and are not on that account subject to the statute of frauds. But the plaintiff is then confronted with the established and well-settled principle that where a part of an entire contract is subject to the statute of frauds, the whole will be infected and will fall.

As said in 20 Cyc. 285, with citation of cases:

"If part of an oral contract falling within the scope of the statute of frauds is in violation of the statute, the whole contract, if it is entire and indivisible, is unenforceable."

And in 25 Ruling Case Law, p. 704:

"If the contract is entire and part is within the statute, it is unenforceable as a whole, and no action can be maintained to enforce the part which would not have been affected by the statute if it had been separate and distinct from the other part."

In the note to *Todd v. Bettingen*, is a thorough discussion of the case in 8 Ann. Cas. 963, beginning as follows:

“Where there is an entire promise, including something void by a statute, the plaintiff cannot separate it, and reject or waive the part of the promise which is within, and recover for that which is without the statute.

*Loomis v. Newhall*, 15 Pick. (Mass.) 159 This rule applies to parol contracts which are entire and indivisible. *Rand v. Mather*, 11 Cush. (Mass.) 1.”

In the case of a parol contract which is entire and indivisible and partly within the statutes of frauds, “the law is well settled that where the several stipulations are so interdependent that the parties cannot reasonably be considered to have contracted but with a view to the performance of the whole, or that where a district engagement as to any one stipulation cannot be fairly and reasonably extracted from the transaction, no recovery can be had upon such stipulation, however free from the statute of frauds it may be.”

*Higgins v. Gager*, 65 Ark. 604, 47 S. W. Rep. 848. Accordingly it has been held in numerous cases, both in the United States and in England, that if one part of a parol contract falls within the statute of frauds, and the contract is entire and indivisible, the contract is invalid to such an extent that the part not falling within the statute of frauds, as well as that within the statute, cannot be enforced in any court.”

Many cases are cited in this note.



We claim, therefore, that the allegations of the plaintiff in error, in his amended complaint conclusively establish that he was a real estate broker; that he cannot recover on an express contract, according to the provisions of Section 808, subd. 8, of the Oregon Code, and the decisions of the Oregon Supreme Court, notably *Oregon Home Builders v. Crowley Supra.*, which hold that the amount or rate of compensation must be stated in the writing, and that in the instant case, plaintiff clearly claims for the reasonable worth of his services; further, that plaintiff cannot recover on a quantum meruit, because the authorities almost unanimously hold under a statute such as our Section 808, subd. 8, that to permit a recovery would nullify the statute (see 17 A. L. R. 891, *Supra* for a full annotation of cases;) and that while the claim may be asserted that part of the services performed under the alleged contract were not under the Statute of Frauds, still as we have shown by citation of authorities, the established rule is that when part of an entire contract, as the present one is declared to be, is under the ban of the statute, the whole contract is infected and is void.

Giving plaintiff in error the benefit of the rule that it need not be alleged that the contract was in writing the alleged contract, if in writing, would nevertheless be invalid because it does not describe the property to be purchased or sold, nor state the rate or amount of commissions or compensation to be paid.

And part of the contract being void under subdivision 8 of Section 808, L. O. L. the entire contract is void.

It was held in *Selvage vs. Talbott, Supra*, that a written contract for the payment of commissions for the sale

of real estate, but which leaves the amount of the commissions to be determined by parol, cannot be enforced, as the failure to express the amount of the commission renders the entire contract void.

See also Foote vs. Robbins 50 Wash. 277; 97 Pac. 103.

A contract partly written and partly verbal is a parol contract and a contract employing an agent to sell lands, which leaves the amount of commissions to be paid to be determined by parol evidence, is under a statute like that of Oregon, void.

Zimmerman, vs. Zehender, 164 Ind. 466; 73 N. E. 920.

Assuming, then, for the purpose of testing the sufficiency of the complaint in this case that the alleged contract was in writting it is void for failure to describe the property to be leased, purchased or sold and for failure to express the rate or amount of commissions or compensation to be paid.

So far as the allegations of paragraphs 16 and 19 are concerned they are wholly insufficient for it is not alleged that defendant in error owned any of its own capital stock, and it could not be bound by any agreement made on its behalf by any if its officers, to pay a commission for the sale of capital stock owned by its stockholders.

The alleged contract was void for another reason and therefore the verdict was properly directed. It is alleged that plaintiff in error was employed to look after the development of over 27,000 acres of timber lands and to assist in marketing the same and the timber thereon. Early testified that the alleged contract of employment was oral

and was made immediately after defendant in error obtained title to this property and with a view of buying or building railroads to facilitate such development of this property. It is apparent it was within the contemplation of the parties that the alleged contract was not to be performed within a year but would extend over several years. It would therefore be void under subdivision 1 of Section 808 Olson's Oregon Laws, reading as follows:

An agreement that by its terms is not to be performed within a year from the making thereof;

We are aware of the fact that there are many cases which hold that if no definite time has been fixed for the performance of a contract and it can be seen from the terms of the contract itself that there is a possibility of its performance within one year, then the statute would not apply. But on the other hand, if it appears that it is the manifest intent and understanding of the parties that the contract contemplated a longer period than one year for its performance, although there is no express agreement to that effect, it is within the statute. One of the leading cases is that of *White v. Fitts*, 102 Me., 240, 66 Atl. 533.

That case was an action to recover damages for the breach of an oral contract to cut and saw into logs the stave wood standing on a lot of land owned by the defendant. The breach alleged was the refusal on the part of the defendant to allow the plaintiff to complete the work after he had entered upon the execution of the contract. One of the defenses set up by the defendant was that the agreement between the plaintiff and the defendant was an oral one, which was not to be performed within one year. There was

no memorandum in writing of the agreement. The Court in discussing the question says:

“The provision of the statute for the prevention of frauds and perjuries here involved is found in chapter 113 of the Revised Statutes (Sec. 1) as follows: ‘No action shall be maintained \* \* \* (5) upon any agreement that is not to be performed within one year from the making thereof, \* \* \* unless the promise, contract or agreement on which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith,’ etc.

It is contended in behalf of the defendant that, according to the principles of law governing the construction and application of this clause of the statute: (1) The contract must be interpreted in the light of its subject-matter and the circumstances surrounding it, and, if the manifest intent and understanding of the parties thereto are that it was not to be performed within the year, it falls within this clause of the statute of frauds. (2) Any contingency terminating a contract within the one-year clause of the statute of frauds must leave the contract fully and completely performed in order to take it out of the operation of this clause of the statute.

“In *Browne on the Statute of Frauds*, 5th ed., Sections 273, 279, 281, the author says: “Postponing the questions, What is the performance of such an agreement? and What the meaning of the limitation as to time? we are first to ascertain the force of the words “to be performed.” And on these words much reasoning has been expended. The result seems to be that the statute does not mean to in-



clude an agreement which is simply not likely to be performed, nor yet one which is simply not expected to be performed, within the space of a year from the making; but that it means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of performance according to its language and intention, within a year from the time of its making. The statute, finding them perfectly free to make a certain contract, without a writing, provides simply that, if that contract does, by its terms, expressed, or, from the situation of the parties, reasonably implied, require more than a year for its performance, they must put it in writing; in other words, it must affirmatively appear from the contract itself, and all the circumstances that enter into the interpretation of it, that it cannot in law be performed within the space of a year from the making."

And, in Section 281: "Where the manifest intent and understanding of the parties, as gathered from the words used and the circumstances existing at the time, are that the contract shall not be executed within the year, the mere fact that it is possible that the thing to be done may be done within the year will not prevent the statute from applying . . . Such an accomplishment must be an execution of the contract according to the understanding of the parties."

In 1 Chitty on Contracts, 11th ed., p. 99, the principle is thus stated: "This enactment applies to all contracts, the complete performance whereof is of necessity to extend beyond the space of a year; the rule being that, where the agreement distinctly shows, upon the face of it, that the parties contem-

plated its performance to extend over a longer period than one year, the case is within the statute. Accordingly, the provisions of the statute render a verbal contract void, if it appears to have been the understanding of the parties at the time that it was not to be completed within a year, although it might be, and was, in fact, in part performed within that period. See also 29 Am. & Eng. Enc. Law p. 94, and 20 Cyc. Law & Prac. p. 198.

In the English case of *Boydell v. Drummon*, 11 East, 142, the plaintiff proposed to publish a series of illustrated scenes from Shakespeare in eighteen numbers; one number at least annually. After receiving two numbers, the defendant refused to take any more. Although there was no express agreement that the contract should not be performed within a year, the court held that it was "impossible to say that the parties contemplated that the work was to be performed within a year;" but that, on the contrary, "the whole scope of the undertaking shows that it was not to be performed within a year, and was therefore within the statute of frauds." That decision has been confirmed by both English and American courts in numerous cases. *Hill v. Hooper*, 1 Gray, Mass. 131.

In *Peters v. Westborough*, 19 Pick., 364, 31 Am. Dec. 142, the court says: "It must have been expressly stipulated by the parties, or it must appear to have been so understood by them, that the agreement was not to be performed within a year." But who can doubt what the express and specific understanding of the parties in the case at bar was? And that it was not to be performed within one year? Or, at any rate, that it appears to have been so understood by them?

In *Doyle v. Dixon*, 97 Mass, 208, 93 Am. Dec. 80, it was held that an agreement not to go into business in a certain place for five years was not within the statute, as the death of the promisor would complete the performance of the contract; but the court, after comparing the case with *Peters v. Westborough*, *supra*, says: "On the other hand, if the agreement cannot be completely performed within a year, the fact that it may be terminated, or further performance excused or rendered impossible, by the death of the promisee or of another person within a year, is not sufficient to take it out of the statute." See also *Carnig v. Carr*, 167 Mass., 544, 35 L. R. A. 512, 57 Am. St. Rep. 488, 46 N. E. 117; *De Montague v. Bacharach*, 187 Mass. 128, 72 N. E. 938; *Warner v. Texas & P. R. Co.* 164 U. S. 418, 41 L. Ed. 495, 17 Sup. Ct. Rep. 147; *Metropolitan Trust Co. v. Topeka Water Co.* (C. C.) 132 Fed. 702."

In *Jones v. McMichael*, 12 Rich. L. (S. C.) 176, one agreed to erect a sawmill on the land of another, who was to deliver all the timber growing on a certain tract, and the profits were to be divided. This continued until the death of the owner of the land. It was held that, if it appeared from the quantity of timber and the capacity of the mill that the parties contemplated the lapse of a longer period than one year before the enterprise could be fully executed, then the agreement was within the statute. And it was also held that it could not have been performed by plaintiff until he had sawed the whole of the specified timber.

In *Pitkin v. Long Island R. Co.* 2 Barb. Ch. 221, 47 Am. Dec. 320, it was held:

“A permanent arrangement to stop trains at a certain place in consideration of plaintiff grading for a railroad track was held to be within the statute, because, from the nature and terms of the agreement, it was not to be performed within a year.”

“And an agreement to use plaintiff’s land as a stock yard, and run trains accordingly, in consideration of plaintiff erecting on his land cattle yards and pens, was held to be within the statute as it was a permanent arrangement, and it was contemplated that it should continue during the existence of the corporation, and it could not be performed within one year.” *Day v. New York C. R. Co.*, 31 Barb. 548; 51 N. Y. 583, Reversing 53 Barb. 250; 89 New York 616, affirming 22 Hun, 412.”

Where the agreement of the defendant upon which suit was brought was not in any event to be performed within a year, it was held to be within the statute, although there were other stipulations providing for contingencies that would make plaintiff liable to defendant within a year and release the defendant,” and in *Wilson v. Ray*, 13 Ind. 1, it was held:

“In this case plaintiff was to build a railroad and take pay in bonds, and defendant agreed to draw, accept and indorse paper; and plaintiff was to pay him one half of the amount over \$.75 on the dollar the bonds sold for, and defendant was to pay plaintiff one half of the amount if bonds sold for less than \$.75; and this suit was for that loss. The defense was that the bonds were not to be sold under sixteen months, and that the railroad could re-



deem the bonds by paying for the same and by issuing stock."

In the case of *White v. Fitts*, *Supra*, the court refers to another Maine case as follows: In *Farwell v. Tillson*, 76 Me., 227, the defendant had a government contract to furnish stone for the custom house at St. Louis, and made a verbal contract with plaintiff for the transportation of the stone from Maine to Baltimore. The government contract required defendant to furnish the stone "at such times as may be required" by the government. No time was specified. The court held that the circumstances showed that the parties did not intend or understand that the contract was to be performed within one year; and hence the contract was within the statute of frauds.

The presiding judge instructed the jury, *inter alia*, as follows: " . . . Was it within the understanding and intention of the two contracting parties, as declared by the contract, that it might be performed within a year? . . . The subject-matter of a contract might be a thing which could not possibly be done within a year. A consideration of the subject-matter would show just as clearly that it was not to be performed within a year, as if there was an express agreement in the terms of the contract that it was not to be performed within a year. So, also, a consideration of the circumstances and subject-matter might show that performance of it within a year would require such extraordinary methods, such extraordinary appliances or resources, as could not, by fair construction, be regarded as within the intention of the parties at the time when the contract was made; and the question is, considering the subject-matter, and the

situation of the parties as known to each other, and reading the contract in the light which these give, whether, by fair construction, it was within the understanding and intention of the parties, as expressed in the contract, that it might be performed within a year, or not." These instructions were held to be correct. In the opinion the court says: "The meaning of the terms of a contract, it need not be said, is to be ascertained by interpreting them in the light of the subject-matter to which they relate. They may mean one thing when used in reference to one subject, or by parties in one situation, and another thing when used under other circumstances in regard to another subject, and the true construction in each instance will be that which applies the contract to the res about which the parties were dealing, and reproduces the intent which they themselves have expressed in it. A description of the nature and extent of the work stipulated to be done, in the absence of express provision on the subject, may be an indispensable element in determining whether the work was, by the contract, to be done in a year, or whether the contract was one not to be performed in that time. It may show performance impossible in that period, or so impracticable as to be plainly beyond the scope and intent of the agreement as expressed in the language used. The duty of the defendant to deliver the granite "at such times and in such quantities as might from time to time be ordered," as was said in the ruling, did not require of him immediate performance, upon demand, of the whole contract."

See additional cases: *Buhl v. Stephens*, 84 Fed., 922, *Johnson & Higgins v. Harper Transp. Co.*, 228 Fed., 730;

Adams-Booth Co. v. Reid, 112 Fed. 106; Long v. Cramer M. & P. Co., 155 Cal 402, 101 Pac., 297; Hagan v. McNary, 170 Cal 141, 148 Pac. 937, 1915 E. L. R. A., 562; Chadwick v. Morris, 170 Ill. App. 569; Williams v. Apoth. Hall Co., 80 Conn., 503, 69 Atl. 12.

The allegations of the second amended complaint are sufficient to show that it never could have been within the contemplation of the parties that there could be a performance of the alleged contract within one year. To develop such a vast tract of over 27,000 acres of timberland and market the timber is a project that is not within the range of possible performance within such time. Even if plaintiff had any right of recovery for services actually performed, the remedy would not be by action on the contract which was void.

*Conceding for the purpose of that portion of our argument to follow, that the second amended complaint states a cause of action still the verdict for defendant in error was properly directed.*

*As stated by the trial court in passing on the motion to strike out the evidence of the alleged contract of August, 1917, "that contract is the one upon which this action is based and it is the one upon which this plaintiff must either stand or fall in this litigation."*

In his first complaint, the plaintiff in error only sought to recover a commission of 5 % for the alleged procuring of a purchaser for certain lands of the defendant in error. (Tr. Rec. 5, 6 & 7.)

It will be observed that in that complaint it is alleged that the contract of employment to negotiate with Kerry,

was made in November, 1920, and refers to the same transaction as that referred to in paragraph 18 of the amended and second amended complaints, each of which contains 19 paragraphs and in each of which it is alleged in substance in paragraph 4, that immediately after the purchase of the timber lands mentioned in paragraph 3 and during the month of August, 1917, the defendant in error hired and employed the plaintiff in error to assist and aid in developing and marketing said property, and contracted to employ plaintiff in error to look after said property, to assist in marketing the timber thereon and in devising ways and means for securing the best possible returns from said property.

In the fifteen succeeding paragraphs are set out seventeen separate transactions in which plaintiff in error alleged that he rendered services and expended money at the request of defendant in error or its officers. These transactions may be summarized as follows:

(1) In paragraph V, plaintiff claims to have negotiated for and secured an option from St. Helens Timber Company and C. R. McCormick Company for the purchase of a logging railroad and equipment, road bed, rights of way, and terminal facilities at St. Helens, Oregon, for \$300,000.

(2) In paragraph VI, he claims to have negotiated with Coleman H. Wheeler and associated companies for transportation facilities over the logging road of said Wheeler and associated companies.

(3) In paragraph VII, he claims to have negotiated with and secured from the Portland and Southwestern Railroad Company a proposal to purchase a half interest in



said railroad, equipment, and rights of way, for \$140,000, with a further agreement to extend said railroad to Vernonia, Oregon, for which defendant company would bear one half the expense.

(4) In paragraph VIII, he claims to have negotiated with Mitsui & Company for the sale of 6,300 acres of the timberland of the defendant to Mitsui & Company.

(5) In paragraph IX, he claims to have secured for defendant a lease of the United Railroad Company for a period of 99 years at an annual rental of \$45,000.

(6) In paragraph X, he claims to have negotiated with Norman R. Smith, of Hammond, Louisiana, and with his associates, F. W. Reimers and E. P. Denkmann, for the sale to them of a portion of the timberland or of the capital stock of the defendant and finally *all* of the property of the defendant.

(7) In paragraph XI, he claims to have negotiated with E. S. Collins for the sale to him of a portion of the timberland or a portion of the capital stock of the defendant.

(8) In paragraph XII, he claims to have negotiated with the Long-Bell Company to sell said company a portion of the timberland or of the capital stock of the defendant, and submitted a proposal for the sale of half of defendant's property.

(9) In paragraph XIII, he claims to have negotiated with Coleman H. Wheeler for the sale of 6,300 acres of the timberlands of the defendant. to said Wheeler.

(10) In paragraph XIV, he claims to have negotiated with William Lee Owens for the sale of a portion of the timberlands of the defendant.

(11) In paragraph XV, he claims to have negotiated with Isaac T. Mann for the purpose of disposing of a portion of the stock or timberland of the defendant.

(12) In paragraph XVI, he claims to have negotiated with Stanley Dollar for the purpose of selling from one-fourth to four-tenths of the capital stock of the defendant.

(13) In paragraph XVII, he has three claims:

He claims to have negotiated with H. E. Noble for the purchase of eight million feet of timber for the defendant.

(14) In the same paragraph, he claims to have interviewed E. B. Waterman for the purpose of interesting him in the timberlands of the defendant.

(15) In the same paragraph, he claims to have negotiated with Jacob Mortenson for the purpose of interesting him in the capital stock or timberlands of the defendant.

(16) In paragraph XVIII, he claims to have negotiated with the Kerry Timber Company for a sale of 2,400 acres of timberland of the defendant, claiming for such services the sum of \$39,117.45.

(17) In paragraph XIX, he claims to have negotiated a sale of all of the capital stock of the defendant to the Central Coal and Coke Company for \$7,000,000, and claims a compensation for said services of \$175,000.

In each of these paragraphs, it is alleged that the services were rendered and money expended under *the contract of August, 1917*.

The plaintiff in error filed a motion to strike the amended complaint, (which by stipulation of the parties and order of the court is made applicable to the second amended complaint) for the reason that it contained fifteen different and separate causes of action. This motion was resisted by plaintiff in error and denied by the court on the ground that the complaint stated but one cause of action based on the alleged general contract of hiring in August, 1917, and it was on this theory that the cause was tried. It follows, as said by the trial judge, that plaintiff in error must rely upon the alleged contract of August, 1917, and cannot rely upon any other contract expressed or implied.

The evident purpose of alleging that these services were all rendered under the contract of 1917, was to evade the provisions of section 808, of the statute of frauds, and sections 8309 to 8316, inclusive of Olson's Oregon Laws. Having adopted this theory of one indivisible contract plaintiff in error must recover upon that contract or fail in his action. If, therefore, plaintiff in error failed to prove the making of the contract, which he alleges was made in August, 1917, he failed to make out a case for the jury.

That plaintiff in error failed to prove the making of any contract between him and defendant in error in August, 1917, or at any time for that matter, is apparent from an examination of the record.

To prove the making of this alleged contract, plaintiff in error called Chas. T. Early, who was a director and the Vice President of defendant in error and who testified on that question as follows: (Transcript of Record, pp. 86-87).

CHARLES T. EARLY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION

(Questions by Mr. Wilbur)

Q. Where do you reside, Mr. Early?

A. Portland.

Q. How long have you lived there, Mr. Early?

A. About eight or nine years, I think.

Q. And during that time, what has been your occupation generally?

A. Up to the fall of 1921, I was with the Oregon Lumber Company, the Oregon-American Lumber Company and the P. A. & P. Railway Company.

Q. The Oregon Lumber Company that you refer to was one of the Eccles interests?

A. Yes, sir.

Q. In this state, and had lumber holdings in this state?

A. Yes, sir. (93)

Q. And the Oregon-American Lumber Company, you say you represent that company?

A. Yes, sir.

Q. In what capacity did you represent that company in this state?



A. I always understood I was general manager.

Mr. DeVine. In the light of that answer, I move the Court to strike it out.

Court. Let him state what he did.

Q. Were you a stockholder in the Oregon-American Lumber Co.?

A. Yes, sir.

Q. State whether or not you were on the Board of Directors.

A. I was.

Q. Were you a vice-president?

A. I am not certain about that, I think I was.

Q. From the time you went into this company in 1917, will you tell the jury what duties or acts you performed for this corporation with their knowledge and consent generally? (Tr. of Record, p. 139).

A. Well, immediately after the property was purchased, we sought the best methods of developing the property. The property was bought for develop (Tr. of Record p. 140) ment and not for holding or for speculation. It (135) had no transportation and I think about the first thing that was done was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad.

Q. Who made those arrangements with Mr. Bates, did you or who was it?

A. I did.

Q. I am coming to that a little bit later. Did you attend meetings of the corporation in Salt Lake City or Ogden?

A. Not in the early history of the company.

Q. When did you attend meetings there?

A. I think it was in 1920. I am not certain that I ever attended a meeting before 1920.

Q. Were you in conference with the officers prior to that time?

A. Yes, sir.

Q. What ones?

A. Well, particularly the President of the company, Mr. David C. Eccles.

Q. How often would you be in contact with Mr. Eccles?

A. Oh, he would come out and sometimes would (Tr. of Rec. p. 141) stay for a day or two, sometimes he would stay for a week.

Q. Was all the property of the corporation in timber holdings in this state?

A. I don't understand the question.

Q. Was all the timber holdings and property of that corporation in this state?

A. Yes, sir. (136).

Q. As far as you know, did any other officers of this corporation or director live in the state besides yourself?

A. No, sir.

Q. Who handled here the business of this company in the handling and operation of the property?

A. I did.

Q. I wish you would state—the Court has said that what it wants to know and what the jury wants to know, is what you did, Mr. Early, in your capacity in reference to the Oregon-American Lumber Company. Can't you tell just exactly what you did?

A. Yes, there wasn't a great deal done just at that time. I looked after the taxes, hired a tax agent and hired cruisers when it was necessary to hire them, and arranged for fire patrol.

Q. In hiring people here, state whether or not you did that yourself here on your own authority for this company?

A. I did all that I have stated, yes, sir.

Q. Now the question you say of tax agent, what was that?

A. Well, we hired a man by the name of Mr. Starr, C. L. Starr, to look after our taxes in the (Tr. of Record p. 142) various counties. He represents most of the timber holders on the coast here, a very good man, and he had plenty of time to do it and I didn't.

Q. Now, what I want to get at, was he employed by you or was that referred to the company? Did you make that employment?

A. I hired him.

Q. Did the company subsequently learn of that or know of it, that you had hired Mr. Starr for tax matters?

A. Mr. Eccles knew of it. I don't know about the other people.

Q. State whether or not there was any objection.

A. No, sir.

Q. Mr. Starr was paid, was he?

A. Yes, sir.

Q. By whom?

A. Undoubtedly by the Oregon-American Lumber Company.

Mr. DeVine. That is a conclusion.

Court. State what you know about it. (137).

A. Well, he was paid, not only by the Oregon-American Lumber Company, but other Eccles interests that he represented. He represented the Oregon Lumber Co., the Sumpter Valley Railway and the Mt. Hood Railway.

Q. In handling their business, did you hire or employ attorneys at times?

A. Well, we used the same attorneys that we had had



for twenty years or more. Any business we had we went to them.

Q. That is the same attorneys. (Tr. of Record 143).

A. Huntington & Wilson.

Q. And any employment you had there for the Oregon-American Lumber Company, who made that employment or request for the attorneys?

A. Well, whatever business that came up that we had to consult an attorney, we took it there. I arranged with them as to fee.

Q. For the Oregon-American Lumber Company?

A. Yes, sir.

Q. State whether or not those were paid by the Oregon-American Lumber Company.

A. They undoubtedly were.

Q. Was any objection ever raised as far as that was concerned, to your handling that matter, employing attorneys to look after their affairs?

A. Not to my knowledge.

Q. Now, the question of any office help, or other things of that kind in handling their office here, who employed that help?

A. Well, I talked that over with the cashier, but he usually hired the help.

Q. But under whose general direction and supervision?

A. Well, under my supervision. If it was necessary to put on another man, or woman, why we discussed it and he was authorized to do it.

Q. Now, how many meetings did you attend, would you say, at Salt Lake or Ogden, where were those meetings held?

A. Ogden.

Q. How many stockholders' or directors' meetings did you attend?

A. I think about four.

Q. All of them at Ogden? (Tr. of Record p. 144).

A. All at Ogden, yes.

#### CROSS-EXAMINATION

Questions by Mr. DeVine. (Tr. of Record 165.)

Q. Mr. Early, where did this conversation take place in 1917, and in whose presence, if any person, with reference to this general contract of hiring?

A. I think it was in my office in the Northwestern Bank Building.

Q. How long was that after the organization of the Oregon-American Lumber Company?

A. I don't recall when it was organized.

Q. With what officers or with whom did you discuss this plan of development that embodied the hiring of Mr.

Bates in 1917, for all of these transactions which you have testified to?

A. No other officer, I think, except Mr. Eccles, until late in 1920. Then I discussed it with not only yourself, but all the other members of the Board.

Q. When you had this discussion then, with Mr. (Tr. of Record 166) Paul C. Bates, here in Portland, Oregon, in 1917, state if you will just what you said (155) to Mr. Bates about this employment.

A. I told him that we wanted to find the most practical way to develop the property, and there were various railroads leading towards it, and we either wanted to buy a road or build one, and my thought was to combine our timber with other timber and purchase a road that was already constructed, and extend it on to this timber.

Q. What else was said, now, aside from that about his contract of employment?

A. Well, it wasn't a very lengthy drawn out discussion. It wasn't necessary. He was simply told to go ahead and make these investigations from time to time, and that he would be paid for his time and his expenses.

Q. You say he was simply told. I am asking you to recite as nearly as you can the conversation. You stated the first portion of it being your theory; what did Mr. Bates then say to you?

A. What did Mr. Bates say to me?

Q. Yes.

A. Very well, he would be very glad to assist in any way that he could.

Q. What else, if anything, was said with reference to the scope of that employment that you were then making?

A. Nothing.

Q. Nothing else at all?

A. No.

Q. What expenditures of money did you then (Tr. of Record p. 166) and there authorize him to make for the Oregon-American Lumber Company?

A. I authorized him to make an indefinite amount.

Q. Did you at that time state to Mr. Bates what your authority was (156) to make this arrangement?

A. I think not.

Q. Did you at that time state to Mr. Bates what your position with the company was?

A. It wasn't necessary. Mr. Bates knew all about it.

Q. So there was nothing said in the conversation, in this general employment, with reference to your position with the company at all?

A. I think not.

Q. Did you at that time, Mr. Early, have any meeting with the directors of the company, in which you were given authority to make such a contract of employment?



A. I had had no meeting with the board.

Q. Did you at that time, or prior to the time that you have mentioned in 1920, and the fall of that year, ever have any meeting with the Board in which the Board took any action authorizing you to make this employment, or any employment?

A. I have already testified that I did not.

Q. Now did you in 1917 occupy a position with the company in which you reported to the Board of Directors at any time? (Tr. of Record p. 168).

A. Prior to 1917?

Q. No, in 1917.

A. No, sir; I think not.

Q. Did you in 1918?

A. I think not. (157).

Q. Did you in 1919?

A. I think not.

Q. Did you in 1920?

A. Yes.

Q. So from the beginning of this employment in 1917 down to 1920, late in 1920, you at no time ever directly or indirectly, or by writing made any report to the Board of Directors of the Oregon-American (Tr. of Record 169) Lumber Companay of any of the previous transactions that you have testified to here?

A. No, sir; I reported to the president.

Q. And as far as you personally are informed, you don't know whether the president of the corporation ever repeated, through writing or orally, any statements made by you in the so-called reports to the president, to his Board of Directors?

A. No, I don't know.

Q. During the entire time, Mr. Early, what salary were you placed upon by the Board of Directors of the Oregon-American Lumber Company?

A. I drew my salary from the Oregon Lumber Company and the Mount Hood Railway Company; I don't think I drew any from the Oregon-American.

Q. And at the time that you said, in 1917, that you made this general contract with Mr. Bates, you have now said to the Court, I take it, as nearly as you can recall, all that was said with reference to that employment?

A. Yes, sir.

Q. Was there anything said in that employment of selling the stock of the stockholders to the Central Coal & Coke Company (158) of Kansas City, Missouri, in 1917?

A. No, sir.

The articles of incorporation of Oregon-American Lumber Co., defendant in error, were introduced in evidence and show that the board of directors consisted of five members of which Early was one and that he was Vice-President; that meetings of the board were required to be held in the

state of Utah; (Tr. of Rec. 113) that the general office was at Ogden, Utah; (Tr. of Rec. 108-109) and that David C. Eccles was president and general manager. (Tr. of Rec. 113).

A copy of the articles of incorporation and other papers necessary to qualify defendant in error to do business in the state of Oregon were filed in Oregon on the 5th day of July, 1917, so that both Early and Bates were charged with notice of the fact that Early possessed no power or authority except such as pertained to his duties as a member of the board of directors and as Vice President (Tr. of Rec. 122-127).

Section 871, of the Compiled Laws of Utah, 1917, then and now in force is as follows:

The corporate powers of the corporation shall be exercised by the board of directors, who, if the corporation be domestic and with franchises limited to the state, shall be stockholders of the company, and at least one of whom shall be a resident of this state, but in cases of consolidated corporations with franchises in two or more states, or states and territories, or of corporations engaged in interstate commerce, no qualifications of residence or stock ownership shall be necessary unless required by the articles of incorporation. The number of directors named in the agreement of incorporation as being sufficient to form a quorum for the transaction of business shall constitute a board, and every decision of a majority of the board so formed shall be valid as a corporate act. In all cases where it is not otherwise provided by the articles, all meetings of the

directors must be held at the principal office of the corporation in this state; but when so provided in the articles, meetings of the directors may be held, for the transaction of any business of the corporation, at such place outside of this state, or elsewhere within this state than at its principal office, as the directors may by resolution or by-laws, provide."

Section 869 in so far as it affects the question here involved provides :

The corporation in its name shall have power to make all contracts necessary and proper to effect its purposes and conduct its authorized business; to sue and be sued; to have a seal, which it may alter at pleasure; to buy, use, mortgage, sell, or otherwise dispose of personal property; to buy, receive, use, sell, mortgage, lease or bond, or otherwise dispose of all such real estate as may be necessary, useful, or desirable for it to own, use or dispose of for its purposes; \* \* \* *provided*, that, in case the articles of incorporation do not provide for the sale or other disposition of the property of the corporation, then the act of the board of directors shall not be valid or binding on the corporation until confirmed by a vote of a majority in amount of the stock outstanding at a meeting of the stockholders duly called to consider such action of the board. When the articles of association provide that the property of the corporation may be sold, mortgaged, or otherwise disposed of by the directors or by the stockholders, sales made in accordance therewith shall be binding on the company.

The articles of incorporation make no provision for the sale of the property of the corporation.



It will be seen that by section 871 the corporate powers of the company are vested in and must be exercised by the board of directors. *And in the exercise of these powers, the board must act as a unit.*

Lockwitz vs. Pine Tree M. & M. Co. 37 Utah 349;  
108 Pac. 1128.

In this Utah case, Mr. Justice Frick, speaking for the court, quotes with approval the following from 10 Cyc. 775.

“The board of directors to whom authority to bind the corporation is committed, is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the Board sitting and consulting together in a body. Individual directors, or any of them, less than a quorum, have no authority as directors, to bind the corporation, and this is equally the rule although the director who assumes to do so may own a majority of the shares.”

And in the course of the opinion, speaking of the powers of the president it is said.

“Under our Statute therefore, the President, as such, of a corporation, has ordinarily only the powers of a director, or such as may be directly conferred upon him by the Board of Directors.”

It is further held in that case that, where the president and secretary of a corporation entered into an option contract for the sale of corporate property for a fixed price payable in installments, pursuant to the authority of the board of directors to the president and secretary to contract for the sale of the property for a specified price, the president alone had no authority to extend the time of the

payment of any installment; the contract making time of the essence.

In *Copper King Mining Co. v. Hansen*, 52 Utah 605, 176 Pac. 623 at 625, it is said:

"It has been determined by this court that under Comp. Laws Utah 1907, Sec. 324, (same as Sec. 871 Comp. Laws of Utah 1917) the president of a corporation ordinarily has only the powers of a director, or such additional powers as may be directly conferred upon him by the board of directors. *Lockwitz v. Mine & Milling Co.*, 37 Utah, 349, at page 355, 108 Pac. 1128, 3 Cook on Corp. (7th Ed.) par. 716, p. 2473. While it is true the president or general manager of a corporation sometimes exercises extensive powers in the executive management of business he is nevertheless acting all the time under the express or implied authority of the directors, who are the real managers of the corporation. He has no implied authority to sell treasury stock. *Camden Land Co. v. Lewis*, 101 Me. 98, 63 Atl. at 531."

These decisions from the Supreme Court of the State of Utah, cover every phase of this case, including the claim by plaintiff in error of a commission for the sale of capital stock. And since defendant in error is a Utah Corporation deriving all its powers from the laws of that State, these decisions are controlling upon all of the courts.

If we turn to the decisions of the State of Oregon, where it is claimed the contract of August, 1917, was made, they are no less conclusive against the plaintiff in error.

In *Crawford v. Albany Ice Co.*, 36 Or. Rep., page 537, 60 Pac. 14, it is said:

"No by-law or resolution was ever adopted by the corporation authorizing its president and secretary or any one else to make and execute promissory notes for or in its behalf; but it is admitted that the note sued on was signed by the persons whose names are affixed thereto, and that they were, respectively, the president and secretary of the defendant, and constituted two of the five members composing its board of directors. It is elementary law that the president and secretary of a corporation, as such, have no power to bind the corporation by the execution of promissory notes or other contracts, but such authority 'must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers, under our law, are exercised by the directors.' *Luse v. Isthmus Transit Ry. Co.*, 6 Or. 125, 131; *Blood v. La Serena L. & W. Co.*, 113 Cal. 221, 41 Pac., 1017 and 45 Pac., 252; *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581 (22 Atl. 575); *People's Bank of New York v. St. Anthony's Catholic Church*, 109 N. Y. 512 (17 N. E. 408); *Leggett v. New Jersey Mfg. & Bank Co.* 1 N. J. Eq. 541, 23 Am. Dec. 728; *Dabney v. Stevens*, 40 How. Prac. 341."

See also:

*Wilson v. Investment Co.*, 80 Or. 253, 156 Pac. 249.

*Harding v. Oregon-Idaho Co.*, 57 Or. 34, 110 Pac. 412.

*Utah Idaho Sugar Co. v. Lewis*, 95 Or. 224, 187 Pac. 590.

*Bell & Co. v. Voght*, 87 Or., 102, 168 Pac. 724.

## DIRECTORS COULD NOT ABANDON THEIR SWORN DUTIES

Considering the importance and magnitude of the authority and functions assumed by Vice-President Early in entering into this alleged contract, involving the sale in one of the items of the whole of the property of the defendant corporation, as shown in paragraph X of the plaintiff's second amended complaint in which plaintiff alleges that he was negotiating for a period of two and one-half years with Norman R. Smith, F. W. Reimers and E. P. Denkman, "for the sale of an interest in or a portion of said property and finally for the sale of *all* of said property," and in paragraph XIX of said complaint where plaintiff claims he was negotiating for the sale and finally consummated the same to the Central Coal and Coke Company of "*all* of the capital stock of this defendant corporation" and considering the other items specified, consisting of the purchase and leasing of railroads, the sale and purchase of large tracts of timberland, and the sale of the capital stock of the company, each involving millions of dollars, we may well say that never in the history of corporate litigation can there be found a case involving such arrogation and assumption of power on the part of a Vice-President. We go further and make the emphatic and challenging statement that no board of directors of any corporation would be permitted under the law to make such a complete delegation and surrender of their duties and functions.

Directors of a corporation before entering upon the performance of their duties subscribe to an oath that they will faithfully perform their duties, and they owe a duty as trustees for the stockholders to give a conscientious



care and supervision to the business and affairs of the corporation. True they may appoint agents to perform ministerial duties, sometimes requiring the exercise of considerable discretion, but in the administration of the large affairs of the corporation, in those affairs upon which the success, prosperity and oftentimes the very existence of the corporation depend, the directors must exercise personal care and supervision in the form of board action and in the discharge of these higher and more important duties involving the highest exercise of discretion and judgment, there can be no delegation and no appropriation of their powers. If it were otherwise, there would be oftentimes a one-man rule, where it was intended by the stockholders and by the law that the several minds of the directors should debate and deliberate, and the result would be wreck, ruin and disaster from lack of that composite judgment and wisdom which would flow from the concerted action of the board.

On this feature of the necessity of the action of the Board of Directors, we invite the attention of the Court to the case of *Ames v. Goldfield Merger Mines Co.*, 227 Federal, 292, in which that Court set forth with admirable clearness and force the functions and duties of directors of a company:

“The issue is: Have the directors of this company abandoned the company? Have they turned the management of its business over to others, and is the business of the Merger Company now being administered by the officers or employes of other companies, whose business is or may develop antagonistic to the best interests of the Merger Com-

pany? The stockholders of a corporation have a right to expect from their directors a conscientious consideration of every proposition which is presented which involves any interest of the company, in conformity to the oath which they have subscribed. They have a right to have the individual viewpoint of the several directors expressed at a conference, for the purpose of obtaining the exchange view of the several persons in arriving at conclusions after deliberate consideration of any issue. It is fundamental that officers of boards can only act as such constituted boards when assembled as such, and by deliberate and concerted action dispose of the issue under consideration, and that they cannot act in an individual capacity outside of a formal meeting, and a majority of the individual expressions be the action of the board. The law believes that the greatest wisdom results from conference and exchange of individual views, and it is for that reason that the law requires the united wisdom of a majority of the several members of the board in determining the business of a corporation, and will not permit the business and concerns of a corporation to be delegated to any officers or men, however capable, or however high their standard for integrity and honesty may be, and that fraud will be implied upon the delegation of such power and right, and the exercise thereof by men who may be the controlling stockholders, even though in their own conscience, they may believe that everything has been done to the very best interests of the concern."

In 10 Cyc., page 770, is the following:

**"DELEGATION OF THEIR POWERS BY DIRECTORS.** General Rule that Directors cannot

**Delegate Discretionary Powers.** The Directors of a corporation cannot as a general rule delegate their discretionary powers to one or more of their number, unless (1) the charter, governing statute, by-law or other valid governing custom empowers them so to do; or (2) there is an instrument permitting them so to do of such public notoriety that persons contracting with the corporation may be presumed to have knowledge of it"; citing many cases.

In 10 Cyc., page 771, is the following:

**"WHAT POWERS MAY NOT BE DELEGATED BY DIRECTORS.** The general rule is that the power to alien the real property of a corporation in any manner except in the ordinary course of business, whether by sale, mortgage, or lease, is a discretionary power which the directors of the corporation cannot delegate to another; and this is so of the power to allot the unsubscribed shares of the corporation, which power has been delegated in the board of directors; and so of the power of making assessments upon shares of the capital stock."

Again, in 21 Ency. Law (2nd Edition) p. 856, under title of "Officers of Corporation" is found the following:

**"DELEGATION OF AUTHORITY.** In General. Employment of Agents. In accordance with the general law of agency, officers and agents of corporations cannot delegate powers which involve the exercise of judgment and discretion, and which it is the intention of the corporation should be exercised by them in person. But officers and agents charged with the general management of the corporate affairs usually have express or implied authority to

delegate to other agents appointed by them the power to manage the details of the business although this may involve the exercise of discretion"; citing cases.

In *Tempel v. Dodge*, 89 Texas, 68, 32 S. W. 514, 33 S. W. 222, the court said:

"Undoubtedly the Board of Directors can appoint agents, whether in form of committees or as a single agent, to transact the ordinary business of the corporation; but we believe the rule is well settled by authority and sustained by sound principle that a board of directors cannot confer upon others the powers to discharge imposed upon them which involve the exercise of judgment and discretion, except in the transaction of the ordinary business of the corporation, unless authorized by the charter." Citing:

*Thompson Corp.*, Sec. 3944 et seq., *Green's Brice Ultra Vires*, 490, 492;

*Tippets v. Walker*, 4 Mass. 595;

*Weidenfeld v. Rd. Co.*, 48 Fed. 615.

In *re County Palatine Loan and Discount Company*, L. R. 9 Ch. App. Cas. 691, it was held that the directors could not delegate to the manager of a corporation authority to purchase shares of the company.

See also *In re London, etc. Bank*, L. R. 3 Ch. App. Cases 651.

In Utah, the home of the creation of the defendant company, it was held in *Flagstaff Silver Mining Co. v. Patrick*, 2 Utah, 304, and *Davis v. Flagstaff Silver Mining Co.*,



2 Utah, 74, that the directors cannot surrender or delegate the entire management and control of the corporate business to a creditor, to be exercised until the payment of his claim.

And in Oregon, in which state the very extensive interests in timberlands of the defendant company were located, it was held in *Patterson v. Smelting etc. Works*, 35 Or. Rep. 105, 56 Pac. 407, as follows:

“Under the maxim, *‘Delegatus non potest delegare*, if the exercise of any measure of discretion or judgment was necessary on the part of the board of directors, in conducting the sale of the corporate property, the authority to dispose of the same by a less number than all the members of the board could not be conferred, except by the stockholders, in whom the power under the statute is lodged; 1 Am. & Eng. Enc. Law (2nd Ed.) 972; *Loeb v. Drakeford*, 75 Ala. 464. And, if the board did not possess the power to authorize the president and secretary to conduct the sale, no ratification by that body, such as a confirmation of the sale, could give validity to an act which the board was incapable of authorizing before it was performed. But where the act to be accomplished is ministerial only, and relates to the performance of a private duty, a less number than those to whom the power has been delegated may properly execute it: *Saltmarsh v. Spaulding*, 147 Mass., 224 (17 N. E. 316).”

This same doctrine is upheld in *Thompson on Corporations*, Sec. 3951.

In *Fletcher on Corporations*, Vol. 3, p. 3148, Secs. 1953 and 1954.

In Clark & Marshall on Corporations, p. 22-32.

See also:

Johnson v. Sage, 11 Idaho 758, 44 Pac. 641;

Gillio v. Bailey, 21 N. H. 149;

Ins. Co. v. Chase, 56 N. H. 341;

Portland Female Orphan Asylum v. Johnson,  
43 Me. 180;

Bliss v. Keweenaw Canal & Irr. Co., 4 Pac. 507;

Caldwell v. Mutual Reserve Fund Life Assn.,  
53 App. Div. 245; 65 N. Y. Supp. 826;

Queen v. Second Ave. Ry. Co., 44 Howard Pr.  
(N. Y.) 281.

Silver Hook Road Co. v. Green, 12 R. I., 164.

It is manifest that, under these authorities, even the board of directors could not have bound the corporation by such an extraordinary contract as the plaintiff in error alleges he made and such as Early testifies he entered into on behalf of defendant in error, with him—a contract which, according to the allegations of the second amended complaint, virtually placed the entire management, control, and disposition of property worth millions of dollars in the hands of plaintiff in error, a stranger to the board of directors, and which authorized him to make unlimited expenditures on behalf of defendant in error, and to involve it in enormous obligations. And certainly a mere director or Vice-President or even a general manager has no such unlimited power. Any rule that would permit such officers or agents to bind the corporation by such extraordinary contracts, would place the corporation and its stockholders at the mercy of an unscrupulous officer and conspirator. Fortunately for honest stockholders,

no such rule of law prevails in this or any other civilized country.

Our contention is that the law has been conclusively and generally established in both State and Federal Courts that a general manager, or a president, or vice-president, although invested with extensive powers to employ and discharge employees and generally to conduct and transact the usual and sometimes called "all kinds of business" for a corporation, still is not empowered to enter into a contract for the sale, purchase, lease or other disposition of its property or empowered to sell its capital stock, or to make unusual and extraordinary contracts of the nature of plaintiff's alleged contract of hiring.

In plaintiff's alleged services under his alleged contract, there were, as we have before mentioned, seventeen different items or specifications. Of these, fourteen were negotiations for the sale or purchase of lands, (including in the alternative five items for the sale of stock and including the purchase of interests in two logging railroads with rights of way); seven items were for the sale of capital stock, (including five in the alternative with timberlands); and two leases of railroads. One of these items, as mentioned before, was for negotiations for the sale of *all* the defendant's property, and another was a claim for the sale of *all* of its capital stock. All of these items concern transactions of a magnitude which would involve the defendant company in some cases in enormous outlays and financial obligations. And there is no evidence in the record that any of these alleged transactions were reported or were known to the board of directors except the one with Ford

and the Kerry Timber Company, in which Bates represented Ford and the Timber Company.

In this case it has been conclusively established by the evidence that Charles T. Early, who made the alleged contract with plaintiff in error, was but vice president at the time of the alleged making of the contract, in August, 1917, but even if invested with the full powers of a general manager, or if acting with the acquiescence and countenance of the general manager, he would not be empowered to make the contract alleged by the plaintiff. An inspection of the articles of incorporation of this company shows that David C. Eccles was president and general manager and Charles T. Early was vice-president of this corporation, at the time this contract was alleged to be entered into, to-wit, August, 1917. (See Article XI of said Articles of Incorporation Tr. of Record 95, 96). The duties and powers of the General Manager are set forth in Article VII on page 93 of the Tr. of Record, and is as follows:

“The Board of Directors may appoint one of their own number, or any other person, General Manager of the corporation, and the duties of the General Manager shall be to look after and superintend all of the affairs of the company, and subject to such regulations as may be imposed by the Board of Directors, to employ all assistance and labor necessary therefor, contract for the compensation of all employees, and discharge any person so employed. The General Manager shall make report to the Board of Directors annually, or oftener if required so to do, setting forth in detail the results of the operations under his charge, together with any suggestions looking to the improvement and



betterment of the conditions of the Company, and to perform such other duties as the Board of Directors shall require."

It will be seen that the prescribed duties of the General Manager placed him entirely under the orders of the board of directors, and there was no thought of permitting him, much less, the vice-president, to sell the corporate property or involve it in the purchase or construction or leasing of railroads; or unlimited expenditures of corporate money.

And the compensation of employees was to be fixed by the General Manager subject to directions of the board of directors. Moreover, the General Manager was required to make annual reports to the board of directors setting forth the result of operations under his charge. Early testified that he "always understood that he was general manager," but admitted that he never made any report to the board of directors, until he was called to Ogden, in the fall of 1920, when a meeting of the board was held and the affairs of the company discussed. (See pages 168 and 169 of printed record). If Early thought he was general manager it is strange that he made no report, as required by the articles of incorporation.

In the instant case there can be no question of *apparent* authority involved, for it appears by the allegations of the complaint of plaintiff in error that this alleged contract of August, 1917, was entered into immediately after defendant in error acquired these timber lands, and by the testimony of Early (Rec. 139-140) that the very first business that was done was to arrange with Mr. Bates to negotiate

for the purchase of a railroad; and in the complaint it is alleged this was done on the 6th day of August, 1917, (Rec. 51.) It is therefore absurd to say that Early had been clothed with apparent authority to enter into the alleged or any contract on behalf of defendant in error.

The judge of the trial court, in passing on the motion to strike out the evidence of the alleged contract on the ground that no authority on the part of Early to make the contract was shown, made a very clear and lucid statement of the law on this subject as follows:

“More than that, I have examined this complaint with a great deal of care and with possibly one exception the services that are sought to be recovered in this case were either for contracts relating to the purchase or lease of property by this company, the sale of its stock or sale of its property, and even a general manager would have no authority to enter into a contract of that kind and bind his company, and if he had no authority to do it, he certainly had no authority to employ another to act for him.

So that as the record now stands the evidence is not sufficient, in my judgment, to show that Mr. Early had any authority to bind the company by the particular contract upon which this action is based.

These transactions that occurred later, the railroad transaction and some of these others, if they were ratified, subsequently ratified by the company, might constitute a separate cause of action but that is not the one upon which this action is prosecuted, and so the court is of the opinion that the motion made is well taken and that the evidence should be stricken out.”

This statement is abundantly supported by both text writers and adjudicated cases.

We have already called attention to the provisions of the laws of Utah under which defendant in error was incorporated and to some decisions of the Supreme Court of that State holding that the corporate powers of corporations formed under the laws of that state, are vested in and must be exercised by the board of directors acting as a unit.

We now invite attention to some of the authorities, which are almost innumerable, which fully sustain the doctrine of these cases.

We arrange these authorities under four different heads, viz:

- 1—Those pertaining to real estate transactions.
- 2—Those pertaining to the sale of stocks.
- 3—Those involving extraordinary contracts.
- 4—Those involving miscellaneous matters.

## POWERS CONCERNING INTERESTS IN LANDS AND OTHER PROPERTY

Elk Valley Coal Co. vs. Thompson 150 Ky. 614, 150 S. W. 817-820, was a case which arose out of a written contract made in the name of the company, through J. M. Thompson, its general manager, agreeing to pay one H. C. Thompson \$8,000.00 for services rendered in the event one Anderson Hogg purchased the coal property of the company which was subsequently purchased by said Hogg. The Court said:

“Coming now to discuss the propositions stated, the first one is: Did J. M. Thompson have authority under the order or resolution appointing him general manager to bind the corporation by the paper he executed to H. C. Thompson.

“It will be observed that by the order or resolution appointing J. M. Thompson general manager he was “to have control and management of the business of this company, subject to the approval of the president or vice-president with the right to employ and discharge employes and transact all kinds of business for said company,” and it is argued that this resolution conferred upon J. M. Thompson ample authority to bind the corporation by the contract he made with H. C. Thompson. It is true the resolution is broadly worded and conferred upon J. M. Thompson large authority, but we think it was not intended to and did not invest him with power to bind the corporation even with the approval and direction of the president or vice-president in the execution of a contract of the character made with H. C. Thompson. The resolution was adopted about a month after the corporation was organized, and there is not the slightest showing that it was contemplated by any of the officers or directors of the corporation at the time that its property would be sold, or that it was intended by this resolution to confer upon Thompson the right to sell it or to bind the corporation in any matters not connected with the transacting of the business the corporation was organized to carry on \*\*\*\*\*. It would be giving to this resolution a meaning not intended and not fairly implied by its reading to say that it conferred upon Thompson authority to sell the property of the corporation or to bind it in any manner



except in connection with the business it was engaged in \*\*\*\*\* and shows very clearly that his power was confined to matters connected with the mining of coal.

“This being our construction of the resolution, it conferred no authority whatever upon J. M. Thompson to bind the corporation by the contract he made with H. C. Thompson and as J. M. Thompson had no authority to bind the company by the contract, neither could the president or vice-president bind the corporation by ratifying or approving the contract. The power of direction and approval vested in the president or vice-president did not go any further than to give them the right to approve anything that J. M. Thompson was authorized by the resolution to do \*\*\*\*\*. As the resolution did not authorize J. M. Thompson to sell the property of the corporation it necessarily follows that it did not authorize him to agree that any person who sold it would be compensated. As the corporation would not have been bound by his act in selling the property, neither can it be made liable for his act in agreeing to compensate the party who negotiated the sale.

Cook on corporations, Vol. 2, Sec. 719.

Thompson on corporations, Vol. 2, Sec. 1576.”

We invite especial attention to the statement above quoted that if the manager could not sell he could not bind the company to compensate a party for negotiating a sale.

Integrity Mining & Milling Co. vs. Moon, 130 Mo. App 627, 109 S. W. 1057 is a strong case on the question of the powers and authority of presidents and general managers to dispose of the property and assets of a corporation. The case arose in an action to enjoin a trespass on real prop-

erty. The defendants claimed their rights by virtue of the permit granted by the president and general manager of the plaintiff. The Court in part says:

“The defendants justify their rights to mine the lots under and by virtue of said permit issued to them by Myers, plaintiff’s president and general manager. But plaintiff insists that said Myers had no authority to issue said permit and that consequently it is a nullity and no justification of defendant’s trespass. The permit was issued by Myers without any authority from plaintiff’s board of directors.

“Section 1320, Revised Statutes 1899, provides that the property and business of a corporation shall be controlled by a board of directors. The statute does not mean that every business act performed shall be in pursuance of an order of the directors of the corporation. It contemplates that the directors shall appoint officers and agents to control the business affairs of the corporation and that the acts of such officers and agents while acting within the scope of their authority shall be taken as the act of the corporation itself. Myers as president and general manager of the plaintiff was clothed with full authority to perform all the duties pertaining to the two offices in the general management of the business and control of all inferior officers and agents in the performance of their duties. He had general charge of the corporation property and could perform all acts necessary to its keeping and preservation, but there were things he could not do. He could not borrow money on the credit of his company nor sell its property or dispose of its assets. (Feld vs. Investment Co. 123 Mo. 603, 27 S. W. 635 Fergusen vs. Venice Transfer Co. 79 Mo. App 352.)

“Defendants have cited certain authorities to the effect that when an officer of a corporation has been put in control of its affairs and permitted to manage and conduct its business, his authority to bind the corporation will be inferred from the ostensible authority conferred upon him. (citing cases.) These cases refer to the general management of the affairs of a corporation and have no application to this case. The fact that Myers was the chief officer of the corporation and its general manager did confer such ostensible authority as would bind the corporation to third parties who dealt with him in the general management of its business but no further. To hold otherwise would place in jeopardy the property of every corporation in the land. ALL WOULD BE AT THE MERCY OF THEIR PRESIDENTS AND GENERAL MANAGERS. (The emphasis is ours). We hold that in order to effectuate a sale of the property of a corporation or its transfer to another corporation the authority of its directors must be had.”

Citing 1 Beach on Private corporations, Vol 1 par. 202 as giving the proper rule.

In Chicago & Northwestern Railway company vs. James, 22 Wis. 187, it was held that under principles which usually govern such corporations, neither a director nor vice-president of a railway company is empowered to bind it by his acts, such as appointing agents to protect its lands or to sell the lands or timber. The Court passing on the authority of vice-president, said:

“And so, too, of the vice-president, we consider his duty in addition to that imposed upon him as director to preside at meetings of the board in the ab-

sence of the president. These principles with regard to the general powers and duties of such officers, are elementary.

In *Walworth County Bank vs. Farmers Loan & Trust Co.* 14 Wis. 325, it was held by this Court that the president of a railroad company had no power, by virtue of his office merely, to make a sale of the property of the company, and his is certainly an office of more dignity and importance than that of vice-president or director. See that case and the authorities there cited and also *Angell & Ames on Corporations*, Sections 299 to 302, inclusive."

*Morgan vs. Washburn Lumber Co.*, 180 S. W. 911 (Tex. Civil App.) is a case wherein plaintiff sought specific performance, or in lieu damages for breach of contract, on a written agreement made and signed by the plaintiff and one Stephenson, president and general manager of the sawmill business of the Lumber company for the sale of 640 acres of land of the company. The Court held:

"That it was not shown that as such president he was authorized to bind the company by a contract to sell its lands. On the contrary it was shown that under the laws of Louisiana in the absence, as was the case, of authority conferred upon him by the company's board of directors he was without power, merely because he was the president of the company, to bind it by such contract. And such is the rule in this state (citing several cases from Texas.) It was not pretended that he was the agent of the company in any other way than as its president and general manager of its sawmill business."



Effort was then made to show that Stephenson was held out by the company as having authority to make contracts binding on it to sell its lands. One Huttnell testified in effect (the testimony being set out in full in the case) that Stephenson with one Mr. Leidigh agreed to sell him a portion of its timber land, and that afterwards, the company made him a deed to the land. On cross examination he said, "I did not get the deed then. It was through the unanimous vote of the board of directors that I got the deed." The court held there was no estoppel on the company's part to deny holding out Stephenson as its agent authorized to bind it by a contract to sell its timber. In the instant case there can neither be estoppel nor ratification as the board of directors had no knowledge of the alleged contract nor of the alleged activities of Bates.

Twelfth St. Market Co. vs. Jackson, 102 Pa St. 269, was a case in which the president of a corporation who had "the general charge and direction of the business of the company, as well as matters connected with the interests and objects of the company" employed a broker to procure a party to pay off an existing ground rent upon the company's property. After such party had been procured the president employed a second broker to notify the original holders to produce the ground rent, or it would be extinguished. The latter agreed to the reduction, and the matter was then brought before the board of managers and ratified. Nothing was said about the employment of the first broker or his commission, and when he brought suit the lower Court permitted the question of ratification to go to the jury. The Supreme Court reversed the case, saying that as the president had no authority it was error to submit the question of

ratification to jury, as there was no evidence that the matter had been submitted to the board, or that they assented to the alleged acts of the president in employing the broker.

In *Jackson Brewing Co. vs. Canton*—118 La 823, 43 So. 454, it was held:

“Where the charter of a corporation provides that all its corporate business is to be managed by a board of directors, and that the board shall define the duties of the President and other officers. AND IT DOES NOT APPEAR THAT THE DUTIES OF THE PRESIDENT OR SECRETARY HAVE BEEN DEFINED, (emphasis ours) those officers have no authority to bind the corporation by the employment of a broker for the purchase of real estate, and in negotiations between the broker (assuming by virtue of such employment to represent the corporation and the owner of the property) the corporation is not represented, hence no contract can result which can bind it. Citing *Dodge vs. Hopkins*, 14 Wis. 687.

*Cowen vs. Curran* 216 Ill. 598, 75 N. E. 322, *Clark & Marshall* p. 953.

In *Groeltz vs. Armstrong Real Estate Co.* 115 Iowa 602, 89 N. W. 21, it was held that where the directors of a corporation give an option to the plaintiff to purchase certain real estate, and give its president authority in pursuance thereof to execute a conveyance, the president has no authority to make a new arrangement with the plaintiff agreeing to pay him a commission for surrendering his option and introducing another party who purchased the property, and that the acceptance of the price from the new party introduced by the plaintiff was not a ratification. The

case held further the question as to the authority of the president was for the court and not for the jury.

On the question that the acceptance of the price was not a ratification the case of *Market Co. vs. Jackson*, 102 Pa. 269 Supra was cited with approval.

*Ansley Land Co. Limited vs. H. Weston Lumber Co.* 152 Fed. 842 brought by the Ansley Co. was a suit to cancel a deed of certain real estate made by its president, M. E. Ansley. The court in the course of its opinion said:

"These extracts from Mr. Weston's testimony show that he thoroughly understood the general rule of law to be AS IT IS that Mr. Ansley by virtue of his position as president of complainant company had no authority to sell the land or timber belonging to the complainant company. He concluded the bargain with Mr. Ansley under the belief that Mr. Ansley was or would be authorized to sell the timber in question by a resolution of the board of directors of the complainant company."

Then follows remarks on a supposed resolution of the directors, which it was shown was not passed. The court concludes that the deed executed by President Ansley was null, saying:

"He was not authorized by any special or general resolution of the board of directors and it was not shown that it was the custom of the company to permit him to make sales of the lands of the company without authority from the board of directors."

In *re Cullian Fruit & Produce Assn.* 155 Fed. on page 375, it was held:

"It is a generally recognized principle of law that the president of a corporation or its general manager, without authority of the board of directors, cannot make a valid conveyance or assignment of the property of a corporation." (Citing a number of authorities.)

In *Johnson vs. Sage*, 4 Idaho 758, 44 Pac. 641, the first point in the Syllabus reads:

"The president and secretary of a mining corporation have no power to appoint an agent or attorney in fact to manage, control, sell and transfer the property of the corporation without being themselves authorized so to do by order or resolution of the board of directors duly adopted by said board."

The second reads as follows:

"A power of attorney to manage, control and lease the property of a mining corporation, does not authorize an attorney in fact or agent to sell and transfer the property of the corporation either in trust or absolutely."

In *Kansas City Hay Press Co. vs. Devol et. al.*, 72 Fed. 717, the court held that where the by-laws of a company provided that the board of directors should have the general management of the officers of the corporation and the president should execute and acknowledge instruments requiring acknowledgment, the president was without authority to make an assignment of a patent. This case cites with approval *Titus vs. Railroad Co.*, 37 N. J. L. 102 and quotes the following language therefrom:

"The affairs of corporate bodies are within the exclusive control of their board of directors from



whom authority to dispose of its assets must be derived."

And further cites in support, *Bank vs. Dunn* 6 Pet. 51, *U. S. vs. City Bank of Columbus*, 21 How. 356, *Railway Co. vs. Allerton*, 18 Wall 233, *Walworth County Bank v. Farmers' Loan and Trust Co.*, 14 Wis. 357, *Hyde v. Larkin*, 35 Mo. App. 365.

In *Brown vs. Bass*, 132 Ga. 41, 63 S. E. 788, the action was for rents arising out of a transfer of a lease and sale of the Sanford farm, the plaintiff claiming to have the contract of transfer through a contract made by the former owner, Union Life Insurance Company, through its president and treasurer, the latter of whom was the "active head of the company." The defendant objected to the introduction of the contract of transfer signed by its officers, there being no proof of their authority to execute the same. The court sustained the objection, and a non-suit was granted, the court saying:

"The transfer was tendered in evidence as an act of the company. The objection called for proof of such act, and we are clear that merely showing that two agents of the company, its president and treasurer, performed the act, was not without more sufficient proof that it was the company's act." The Court cites a number of authorities in support of its ruling.

In *American Rio Grande & Irrigation Co. vs. Mercedes P. Co.* 155 S. W. (Texas Civil Appeals) p. 286 at p. 294 the Court approves *Gashwiler vs. Willis* 53 Cal. 11, 91 Am. Dec. 607, to the effect that the rule is firmly established in this

country that the powers of a corporation can be exercised only by its board of directors, *regularly assembled in a directors' meeting; that all of the directors acting separately have no power to sell or authorize the sale of corporate property.* Further on in this case the Court says:

“No circumstances short of actual notice of express authority would justify purchasers of land to assume that a general manager of a corporation had authority to sell the land of the company. A general manager can be presumed to have such authority as is necessarily incident or customarily exercised by officers of like position.” Citing Thompson on Corp. Sec. 4871-4887 and several cases.

In *St. Vincent College vs. Hallett*, 201 Fed. 471, where the by-laws of a college corporation placed the management in the hands of five trustees and declared no purchase of real estate, deed, mortgage or note should be made unless authorized by a resolution, and said by-law further provided that the president should execute all instruments about the business of the college and in general should exercise all authority and perform all acts usually exercised by presiding officers of colleges, it was held that the by-laws should be construed as merely designating the president to perform ministerial acts and did not authorize him to bind the corporation by the execution of notes as evidence of loans not authorized by the trustees.

In *Franklin vs. Havalena Mining Co.*, 16 Ariz., 200, 141 Pac., 727, it is held that neither the president, secretary nor general manager of the corporation has power, merely by virtue of his office, to lease or sell the property of the

corporation and such lease, when not ratified by the Board of Directors, is not binding.

That case further holds, quoting from Cook on Corporations (6th Edition) §716, as follows:

“The President of a corporation has no power, by reason of his office alone, to buy, sell, or contract for the corporation, nor to control its property, funds, or management.”

Also:

“The Secretary of a corporation has no power, merely as secretary of the company, to make contracts for it.” Cook on Corporations, §717.

The Court further holds as follows:

“A general manager of a corporation has no power merely by virtue of his office to do ‘anything out of the usual course of business’ of his company.”

It quotes with approval from Cook on Corporations, § 719, as follows:

“The general manager does not displace them (directors), and a person dealing with the corporation is bound to take notice of that fact.”

The Court proceeds:

“None of the officers who signed the contract of August 5th, nor all of them together, could bind the corporation merely because they were officers. The instrument was not the act and deed of the corporation.”

In McKibbin vs. Hulton D. & F. Co., 227 Pa. St. 153, 75 Atl. 1038, it is held that a contract in writing for the pur-

chase of real estate made by the president of the corporation in the company's name, without authority, and contrary to the by-laws and without the knowledge of the directors was invalid, and no ratification could be inferred from the fact the company entered into possession of the real estate under a lease which was separate from the contract of sale, and had paid rent under said lease.

No presumption of authority to sell lands of a corporation arises in favor of the general manager of a corporation. *Hurlburt vs. Gainer*, 45 Tex. Civ. App. 588, 103 S. W. 409.

In the *Conqueror, etc. Co. vs. Ashton*, 39 Colo. 133, 90 Pac. 1124, the first, second, third and fourth paragraphs of the syllabus are as follows:

"Where the board of directors of a corporation is vested with the general management of its affairs, a person doing business with an alleged agent of the company, is bound to take notice of the extent of such agent's authority. Page 138.

"The power to make a contract binding a corporation to pay a certain sum to lessees for surrender of their rights under an alleged lease is not incidental to the office of the president and general manager, and such a contract is not binding on the corporation in the absence of evidence of authority to make it or of its ratification by the company. Page 138."

"A contract made without authority by the president and general manager of a corporation cannot be ratified by the board of directors unless the



board has full and complete knowledge of its terms and conditions. Page 138.

“An agreement by the owner of property to pay a certain sum to an alleged lessee for the surrender of his rights under a void lease is not supported by a valuable consideration. Page 139.”

The case of Extension etc. Co. vs. Skinner, 28 Colo. 237, 64 Pac. 198, is also directly in point. There it was held that the directors could act only as a board, and not individually and that a contract made by one of the directors of the corporation who was also Secretary and Treasurer, whereby he agreed on behalf of the Corporation to pay a commission for the sale of its mining property, was not binding on the company, and this, although the president had promoted the sale.

Caddy Oil Co. vs. Sommer (Ky.) 218 S. W. 288, was a case in which the president of the corporation made a contract with a broker by which the broker was to sell the oil lease of the corporation. In the course of the opinion it was stated:

“Sec. 551 Ky. Stats., provides in whom the governing power of a corporation is vested in this state, and that is in its board of directors, of which each corporation shall not have less than three, and a majority of whom shall constitute a quorum with power to transact business. The board of directors cannot bind the corporation except when acting as a body, and agreements between individual members of the board are not binding upon the corporation. American Nail Co. vs. Gedge, 96 Ky. 513, 29 S. W. 353, 16 Ky. Law Rep. 663; Mora-

wetz on Corporations, p. 88; Beach, Sec. 224. Hence, in determining whether an officer or other agent of a corporation has been vested with binding authority by the corporation to act for it in a matter, there must be express authority found for the action of the officer in the by-laws, resolutions, or acts of the board of directors, or else the act must appear within the scope of the apparent authority with which the board of directors has invested him, by the manner in which the officer has been permitted by it, with knowledge and approval of or acquiescence in his acts, in the transaction of its business. This apparent authority is, however, limited and governed by the character of business in which the corporation is engaged. (Citing a long list of authorities).

The Court continues:

“There is an entire failure of any evidence as to the customary manner of dealing by the appellant from which it could be implied that the president was either authorized to sell the property of the corporation or to contract to pay anyone to effect a sale for it. The most that the evidence tends to prove in the way of clothing him with an apparent authority to bind the corporation by the contract sued on is that the president has supervision of the drilling operations upon the “Jack Wells” lease, but any apparent authority that might arise from such employment by him could not be extended to authority to sell the lease, and without such authority he was without power to contract for the corporation to compensate one for making a sale. *Elk Valley Coal Co. v. Thompson*, *supra*; 2 *Thompson on Corporations*, Sec. 1576.”

In *Lawrence et. al. v. Montgomery Gas Co. et. al.* (W. Va.) 106 S. E. 890, the Court held as follows:

“Corporate action cannot be lawfully expressed or made binding by less than a quorum of directors or stockholders acting jointly in a meeting thereof regularly called and after due notice as provided by law or by-law of the corporation.”

In the course of its opinion the Court said:

“The law is well settled in this state as elsewhere that corporate action cannot be lawfully expressed or made binding by less than a quorum of the directors or stockholders acting jointly in a meeting thereof regularly called after due notice as provided by law or by-law. \* \* \* \* And as said in 3 Thompson on Corporations, Sec. 3906, cited and quoted in our case just referred to, ‘When they (the directors) are not consulting together as a board, they are regarded as acting privately and unofficially.’ \* \* \* \* There is no need of elaboration of this proposition by further reference to the authorities \* \* \* \* .

“Our decisions say that authority of the president or other officer to transact the ordinary business of the corporation will not impose liability on the corporation for extraordinary contracts made by them, involving expenditure of large sums of money for supplies or machinery, or the disposition of its plant or property, not implied by the nature of the business. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 70 W. Va. 169, 73 S. E. 321. And to be binding as a ratification of the unauthorized act of an officer or other agent of a corporation, the board of directors must not have been

ignorant of the facts in relation thereto. *Flannagan v. Flannagan Coal Co.*, 77 W. Va. 757, 88 S. E. 397."

### AUTHORITY TO SELL STOCK

In *Rattvay v. Wickersheim Impl. Co.*, 36 Cal. App. 253, 171 Pac. 964, it was held:

"The fact that Wickersheim was president and general manager of the corporation did not authorize Wickersheim to sell shares of stock of the corporation or determine the price for which they would be sold, OR TO EMPLOY an agent to find purchasers for the stock. Such transactions are not within the scope of the business which either a president or a general manager is by virtue of his office qualified to transact for the corporation." Citing *N. W. Packing Co. v. Whitney* 5 Cal. App. 105 89 Pac. 981.

See also *Demarest v. Spiral Riveted Tube Co.*, 71 N. J. Law, 14, 58 Atl. Rep. 161, on the sale of stock.

In the case of *East Cleveland R. R. Co. vs. Everett*, 19 Ohio C. C. 205, the court held as follows:

"Where the president of a corporation is authorized to act as superintendent or general manager of a company in the conduct of its ordinary and routine business, his powers are not thereby so enlarged that he can legally of his own motion, undertake the sale of the company's bonds."

See also *Clarkson v. Keystone Oil Cloth Co.*, 23 Pa. Co. Court 189.



*Waters v. American Finance Co.* 102 Md. 212, 62 Atl. 357 was an action to collect commissions for the sale of stock on a contract made with the secretary and general manager of the company, held: *That the plaintiff was bound to produce affirmative proof of the authority of the general manager to make the contract, and that there is no presumption of such authority.*

In *re Continental Engine Co.*, 234 Fed. 58, it was held:

“Whatever may be the presumptive authority of the President of an Illinois business corporation to execute notes for its ordinary business transactions (See cases cited in *Hallett v. St. Vincent College*, 201 Fed. 471, 119 C. C. A. 647) there is no such presumption in favor of a payee who knows that the notes were given for other purposes. Neither securing fresh capital by the sale of additional stock, nor contracting to pay commissions therefor, is an ordinary business transaction of the corporation, within the implied powers of the president acting as general manager; so that, irrespective of the by-laws or the specific conditions upon which alone the note was to become effective, it was invalid as between the parties, because unauthorized either by the directors or shareholders of the bankrupt.”

In *Zarriello v. U-Need Ice Co. Inc.*, 191 N. Y. Supp. 207, it was held:

“One employed ‘as general manager, to employ the necessary help as might appear to be beneficial to the proper conduct of the company’ was not thereby necessarily authorized to employ one to sell stock of the corporation.”

In *Great Southern etc. Company v. Guthrie*, 13 Ga. App. 288, 79 S. E. 162, it was held that the agent of a corporation who was vice president and afterwards president of the corporation, did not authorize him to appoint other agents to sell corporate stock, holding that a quorum of directors is necessary for legal corporate action, and action of individual directors is insufficient and not binding. Likewise that the president of a corporation has no authority as such, to appoint agents to sell stock for the corporation."

The president of a railroad company has no implied authority to give a power of attorney for the sale of its bonds. *Titus et. al. v. Cairo & F. F. R. Co.*, 37 N. J. L. 98.

Also see *Copper King Co. v. Hanson*, 176 Pac. 623 (at 623), (Utah), citing *Camden Land Co. v. Lewis*, 101 Maine 98, 63 Atl. 531, on this same subject of the lack of authority of president or general manager to sell capital stock.

## AUTHORITY TO MAKE EXTRAORDINARY CONTRACTS

In *Wainwright v. Roots Co.*, 176 Ind. 682, 97 N. E. 8, the general manager of the corporation entered into a contract on behalf of the corporation to erect a building and install machinery and making plaintiff superintendent for 5 years at a certain salary and allowing him a certain portion of the profits. Held: That the business must be conducted by the board of directors, and that the general manager had no authority to make such a contract.

In *Caldwell v. Mutual Reserve Fund Life Assn.*, 65 N. Y. Supp. 826, 53 App. Div. 245, is a case wherein plaintiff sued the insurance company for \$50,000 for alleged services as manager of its Liverpool Department and under an alleged contract to secure a competent person to take his place, and for such services to pay certain admission fees for a term of ten years.

The Court shows that pursuant to the statute under which the company was organized and under its by-laws, the directors were authorized to elect three of their number to constitute an executive committee. The plaintiff claimed he made his contract with Bloss, the vice-president of the executive committee acting in conjunction with one Haywood, general manager of the company at London, and that said contract was authorized by the other two members of the executive committee. The referee found for the plaintiff for the full sum with interest, and judgment was entered for that sum. The Court on appeal reversed the judgment, saying in part:

“But there is no satisfactory proof that the executive committee, acting as such, ever conferred authority upon Bloss and Haywood, acting separately or in conjunction with each other. No resolution of the executive committee or record of its proceedings was shown from which such fact could be found or inferred, and even if such fact had been shown, it would not have availed the plaintiff for the reason that the executive committee did not have the power to thus bind the defendant. But, if it be assumed that the executive committee did have such power it certainly did not have the power to delegate that

authority, involving in its nature the exercise of judgment of the very highest character, to one of its members. It could only act as a whole in whatever was done in which each member either participated or had an opportunity to participate. And it cannot be presumed in the absence of some act of the corporation specially conferring authority upon Haywood, that simply because he was the general manager in London he had power to bind the defendant to contracts of an extraordinary nature, and of a character that would involve the corporation in enormous obligations, extending over long periods of time. Citing *Comacho v. Engraving Co.*, 2 App. Div. 369, 37 N. Y. Supp. 725. But it is said that the defendant subsequently ratified the contract with Bloss made with the plaintiff. \* \* \* There is, however, no force in this contention, inasmuch as no evidence was introduced upon the trial which established that the board of directors of the defendant ever knew that such a contract had ever been made. \* \* \* There can be no such thing as ratification unless the one ratifying acts with full knowledge of what has been done. Citing *Trustees, etc. v. Bowman*, 136 N. Y. 521, 32 N. E. 987."

The case of *Camacho v. Hamilton etc. Co.*, 2 App. Div. (N. Y.) 369, 37 N. Y. S. 725, was likewise an action for breach of contract of employment for three years at a stipulated salary. The contract consisted of two letters written by plaintiff and by the Vice President and general manager of the corporation. The trial court excluded these letters as evidence of a contract on the ground that no authority was shown on the part of the general manager to enter into such a contract on behalf of his corporation.



This ruling was upheld by the appellate court. In the opinion it is said:

“But no presumption of law can be indulged in that, because a person acts as such manager, i. e. general manager, he has the power to bind his principal to contracts of an extraordinary nature of such a character as would involve the corporation in enormous obligations for long periods of time. If a general manager, simply by virtue of being charged with the ordinary conduct of the business, would have a right to bind his principal to a contract for service for three years involving the obligation to pay thousands of dollars of salary to an employee, why may not that power extend indefinitely, so that he may make contracts for all employees for indefinite periods, and thus assume to himself a power which it cannot be supposed was ever intended to be lodged in him?”

*Laird v. Michigan Lubricating Co.*, 153 Mich. 52, 116 N. W. 534, is a case directly in point with this case. The management of the affairs of the corporation was by law entrusted to a board who were chosen annually. The secretary, treasurer, and manager for the company entered into a written contract with the plaintiff whereby he was employed for a period of three years at a salary of \$1500.00 per year. The president and board of directors had no knowledge of this contract until some time after it was made and when he learned of it the president disputed its validity, and before the expiration of the three years, plaintiff was discharged. He sued for breach of contract. It was held that the Manager had no authority to bind the company by such a contract. The court speaking through Mr. Justice Montgomery said:

"It would seem clear that in the absence of any evidence of custom or any holding out as possessed of authority, other than the bare fact that he was secretary-treasurer and manager, the authority to continue employment not only beyond his term of office but beyond the period during which the entire management of the affairs of the company might be changed by the election of a new board of directors, would not be implied."

In *Francis v Spokane, etc. Club*, 54 Wash. 138, 102 Pac. 1032, the Court held that where the management of a corporation is conferred on a board of directors, the manager has no authority to employ a clerk for 26 weeks.

In *Carney v. New York Life Ins. Co.*, 162 N. Y. 453, 57 N. E. 78, it was held:

"A by-law of a corporation, adopted by the board of trustees, whose terms of office continued only four years, authorizing the president and actuary of the company to appoint, remove, and fix the compensation of each and every person employed by the company, does not authorize a contract by the president and actuary in behalf of the corporation employing a person for life.

In the course of the opinion the Court said:

"We may assume that the power given to appoint was intended to include the power to employ, and to agree upon the compensation that should be paid; but in assuming this we cannot believe that the board of trustees, in adopting the by-law, intended to invest the executive officers named with the power to enter into unreasonable contracts as to the term of employment."

In *Thompson v. Central Pass. Ry. Co.*, 80 N. J. L. 328, 78 Atl. 152, there were a number of suits pending against the company, and its president entered into an agreement to pay the assignor of the plaintiff \$10,000 if he could secure the dismissal of these suits which were interfering with the construction of the railroad. This he did; in an action to recover the \$10,000. Held: That the agreement was of a peculiar character, and being made without the knowledge of the board of directors, did not bind the corporation.

In *Rennie v. Mutual Life Ins. Co. of New York*, 176 Fed. 202, it was held in affirming a directed verdict for the defendant that although the by-laws provided the president should have the general direction and superintendence of the affairs and of the officers of the company and should establish rules and regulations for the conduct of the business of the company, nevertheless, he was not vested with the power to make an oral contract with a general agent binding the company after the termination of such agency in a certain contingency to pay said agent a sum annually during the remainder of his life sufficient for his support.

*Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020, was a case in which plaintiff sued the company on an alleged contract for procuring a loan of \$100,000 for the company, the plaintiff to receive ten per cent of that sum. The contract was claimed to be made with Samuel B. Diller, its president. A non-suit was granted, and the court in passing on the authority of the president, said:

“The transaction which it is claimed the corporation employed the plaintiff to make was an ex-

traordinary one, and quite beyond the sphere of its ordinary business and the customary scope of the agency of a president of such corporation."

In *re Trion Mfg. Co.*, 214 Fed. 161, it was held that the acts of the president of a corporation organized to manufacture cotton goods with power to engage in mercantile business in connection with its factory, in buying and selling in the name of the corporation cotton futures as a mere matter of speculation are *ultra vires*, and the broker conducting the transactions has no claim against the corporation on account thereof.

In *Chard v. Ryan-Parker Const. Co.*, 169 N. Y. Supp. 622, it was held:

"The president of a construction corporation could not bind it on a contract giving one, who was neither engineer nor lawyer, half of the profits of a big job, in return for personal services, unless expressly authorized to do so, although the president had general control of the corporation."

And on the further ground that such a contract was one of an extraordinary nature.

And the president of a manufacturing company could not be presumed to have had authority to employ brokers on behalf of the corporation, to sell a mill and quarry which were a part of the corporation's manufacturing equipment. *McCorry v. John C. Wiarda & Co.*, (1912) 149 App. Div. 863, 134 N. Y. Supp. 667.

The president of a railway corporation has no implied power to contract in its behalf for services in procuring



contractors to build the railroad. *Risley v. Indianapolis B. & W. R. Co.* (1874) 1 Hun (N. Y.) 202.

In *Bright v. Metairie Cemetery Association*, 33 La. Ann. 58, the plaintiff, an attorney at law, was employed by the president of the corporation to conduct certain litigation. He sued to recover compensation. The trial court permitted him to prove the contract without first proving that the president was authorized by the board of directors to make the contract. This was held to be erroneous. The Court said:

“We are clear that the court erred in admitting this evidence, all of which should have been excluded.”

In *Northwestern Packing Co. v. Whitney, et. al.*, 5 Cal. App. 105, 89 Pac. 981, a letter was written by the President of the corporation, and in it he said:

“‘I will give you the handling of all the salted salmon packed by the Northwestern Company and other companies in which I may be interested this year.’ It is not attested by the seal of the corporation. There does not appear to have been any resolution of the board of directors authorizing the contract. The salmon pack of 1902 was the property of the plaintiff, an artificial being, created under the provisions of the statute. The title was in the corporation and not in Pedersen. The corporation could only act, could only speak, through the medium prescribed by law—the board of directors. The statute under which the corporation was created contains the express mandate: ‘The corporate powers, business and property of all corporations formed under

this title must be exercised, conducted, and controlled by a board of not less than three directors.' Civ. Code Sec. 305. The rule has been adhered to by the courts. *Gaswiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Alta Silver Mining Co. v. Mining Co.*, 78 Cal. 629, 21 Pac. 373; *Fontana v. Pacific Cann. Co.*, 129 Cal. 51, 61 Pac. 580. The President of a corporation has no authority by virtue of his office to buy or sell the property of the corporation, or to make an executory contract binding upon the corporation. *Bliss v. Kaweah C. & I. Co.*, 65 Cal. 502, 4 Pac. 507. The doctrine of estoppel does not apply because the corporation has not availed itself of any benefit in any way or manner by reason of the alleged contract."

And see *Stephen v. John L. Roper Lumber Co.*, 75 S. E. 933, 41 L. R. A. (N. S.) 1141, in which it is held that a superintendent of a lumber camp has no implied authority to contract with an employee who is being laid off and pay him a monthly salary in consideration of his refraining from taking other employment, and in which there is a thorough discussion of the extent of the authority of agents and that they are not empowered to make unusual and extraordinary contracts, and which case cites numerous decisions, among them *Western National Bank v. Armstrong*, 152 U. S. 346.

In *Vogel v. St. Louis Museum*, 8 Mo. App. 587, it was held:

"Nor has the president of a business corporation any power as such to appoint a general business manager for the corporation without consent of the board of directors."

## AUTHORITY IN MISCELLANEOUS MATTERS

In *Kline Bros. & Co. v. Royal Ins. Co.*, 192 Fed. 378, it was held that the president had no authority to make a contract for insurance in its behalf when there was a by-law providing that "all contracts or obligations of any kind which may be entered into shall be made by the board of directors," although the by-laws further provide: "The president shall preside at all meetings and have supervision of the affairs of the company UNDER THE DIRECTION OF THE BOARD OF DIRECTORS.

In the case of *T. E. Wells & Co. v. Shoop*, 208 Fed. 393, it was held that the president and active manager of a corporation with the secretary had no authority to execute a chattel mortgage on certain personal property, to-wit: elevators, and that the same should have been authorized by the board of directors. Speaking of the action of the president and manager, the court says: (p. 397)

"But the argument is made that because Walter was the president and active manager of the business of the corporation he was *ipso facto* empowered to execute the mortgage in question. Without doubt his general authority as chief executive officer and active manager of the business of the corporation empowered him to transact the usual and ordinary current business in the usual and ordinary course, such as contracting for the purchase or sale of grain or coal in which the corporation was authorized to deal, and to perform like acts necessary and incidental to the conduct of the business, but we are of the opinion that this implied authority did not comprehend the power to dispose of the building or ma-

chinery or appliances which the corporation had acquired and was then using for the transaction of its business."

In re St. Helens Mill Co., Fed. case 12,222, Circuit Justice Field in approving of the opinion of Judge Deady says:

"It presents with clearness and precision the necessity of a corporation attaching its seal to an instrument to render it operative as a deed; and holds in accordance with the uniform current of the authorities that the power to execute a mortgage by its officers can only be conferred by vote of the directors meeting together and acting as a board."

See also:

In re Progressive Wall Paper Corporation, 230 Fed. 171,

holding that a majority of the stockholders of a corporation must assent to a mortgage.

In Maryland Finance Corporation v. Duvall, 284 Fed. 764, it was held the president had no power to execute a chattel mortgage on the company's property, and in discussing generally the power of a president, the Court said:

"The doctrine of the limitation of the power of a president of a corporation to incumber its assets is of almost universal recognition.

" 'He has no implied authority, simply by virtue of his office as president, to make any contract for the corporation \* \* \* or to convey the property of the company, or to sell or sign the corpora-



tion's notes, bonds, or other assets, or to mortgage any of the corporate property, or surrender or transfer the corporate franchises.' Purdy's Beach on Private Corporations, vol. 2, sec. 793.

“ ‘An officer or agent of a corporation, in order to bind the corporation by a mortgage or pledge of its personal property, must have express or apparent authority to do so, and this power is not inherent in the office of the president, or of the secretary \* \* \*.’ 7 R. C. L., 645.

“ ‘The president, or the president and secretary, have no power, merely by virtue of their offices, to execute a mortgage or pledge of the property of the corporation, even though he or they own all or most of the stock, and this rule is particularly applicable where the authority to manage and conduct corporate affairs is expressly vested in the board of directors.’ 14-A Corpus Juris, 465.

“ ‘As a general rule a person dealing with a corporation is bound to know whether or not the person who assumes to represent it and to act in its name is authorized to do so, and the nature and extent of his authority; he must take notice that such authority is derived from statutes, by-laws or usages which more or less define its extent, and is chargeable with notice of limitations and restrictions imposed by statute or by the character or constitution of the corporation.’ ” 14-A Corpus Juris, p. 351, Sec. 2213.

In *Murphy v. Cane, Incorporated*, 80 N. J. L. 163, 76 Atl. 323, it was held the president of a building construction company has no implied power by virtue of his office as such to award subcontracts on construction work for

which his company has the main contract. (Citing a large number of authorities.)

In *Rizzuto v. English Lbr. Co.*, 44 Colo. 413, 98 Pac. 728, it was held that the general manager of a corporation engaged in selling lumber at retail has no power by virtue of his employment to borrow money on the credit of the company or to give the latter's note therefor. (Citing several cases.)

In *Rasnick v. Ritter Lumber Co.*, 219 S. W. 801, it is held that the Superintendent of the company did not have authority to compromise a threatened suit against the company by making a contract giving the party who threatened the suit employment in the saw mill, and in the course of the opinion it was held:

"It is not alleged that Kopp, the superintendent of the defendant, possessed authority to bind his principal upon the contract sued on. While the Articles of Incorporation of defendant do not anywhere appear in the record, we know as a matter of law that a corporation authorized to engage in the manufacture of lumber would have no authority as such to engage in the compromise of suits not filed against it, but filed only against its employees individually, and we likewise know that a superintendent of a saw mill is not by virtue of his office a compromiser of law suits filed against others than his principal and covering matters not indirectly affecting the latter's business."

In *Hall v. Passaic Water Co.*, 83 N. J. L. 771, 85 Atl. 349, it was held that the Corporation was not bound by an unusual contract made by its superintendent, not shown to

be within the scope of his express or implied authority, nor in the course of the ordinary business of the company. The superintendent entered into a contract for the supply of water at a certain time for fire purposes.

Held: That the corporation was not bound.

In *Roben v. Ryegate Light & Power Co.*, 91 Vt. 402, 100 Atl. 768, it was held that the general manager of an electric power company, who is also its president, *has no implied authority to contract to enlarge the plant's capacity.*

In *Victoria Gold Mine Co. v. Fraser*, 2 Colo. App. 14, 29 Pac. 667, the syllabus reads:

1. "The general manager of a milling company has no power, by virtue of his office, to bind the company by contracts for the purchase of machinery.

2. "In an action against a milling company for the price of machinery sold on the order of defendant's general manager, plaintiff cannot recover unless he shows either that the manager had authority to bind defendant by the purchase or that defendant ratified it.

3. "In such case it was error to refuse to charge that, where a person deals with a corporation through one of its members, he does so at his peril, and it is his duty to see that the person with whom he transacts his business is actually such agent, and that what he did was within the scope of his authority."

In *Napier v. Mozena Coal Co.*, 103 S. E. 125, it was held:

“Neither C. C. Deegan, defendant’s mine superintendent, with whom plaintiff says he contracted, nor Eric Pyle, Deegan’s successor in the same capacity, had express authority to bind the company by the alleged promise to advance \$800, the sum required to redeem the teams from indebtedness, a promise not definitely proved, and it is gravely doubtful whether either of them had implied authority to do so. Their duties as superintendents, it is true, according to the proof, related to the employment and discharge of men and to the general management and supervision of the particular portion of the business intrusted to them. Their power to bind the corporation was not restricted solely to acts and promises made within the scope of their express authority, but included also such as were by implication reasonably necessary to effectuate the results authorized, in the usual and customary manner. They necessarily possessed authority requisite to enter into such contracts as were reasonable and usual in the operation of mines. But whether a particular contract falls within such implied power depends upon whether its execution is reasonably necessary to, and customary and usual in, the performance of the duties to be discharged by superintendents.” Citing a number of cases and continuing:

“In the case first cited this court reconized that there was no implied authority in the general manager of a corporation operating a summer hotel to make unusual, extraordinary, or unnecessary contracts for labor, but held that the employment of a carpenter to reside on the ground and work out of season in making necessary repairs, usually made at such time, and to have the property in readiness for



the coming season, was not unusual or unnecessary and therefore was within the implied power of the manager, though extending slightly beyond the term of his own employment."

In *Aerial League of America v. Aircraft Fire-proofing Corporation* (N. J.) 117 Atl. 704 the Court held.

"It was incumbent upon the plaintiff to show that the contract upon which suit was brought was the contract of the defendant. To bind the defendant, the contract must be proven to have been the act of the defendant either by corporate action, the act of an authorized agent, or by adoption and ratification. *Beach v. Palisade Realty & Amusement Co.*, 86 N. J. Law, 238, 90 Atl. 1118. A corporation is bound by the act of an officer or agent only to the extent that the power to do the act has been conferred upon such officer or agent expressly by the charter, by-laws, or corporate action of its stockholders or board of directors, or can be implied from the powers expressly conferred, or which are incidental thereto, or where the act is within the apparent powers which the corporation has caused those with whom its officers or agents have dealt to believe it has conferred upon them. It often results that one occupying a high official position in a corporation is without the power to bind the corporation by contract. Thus, in the case of *Thompson v. Central Passenger Railway Co.*, 80 N. J. Law, 328, 78 Atl. 152, a president of a corporation was held to have had no authority to bind the corporation by the contract therein considered. To the same effect is *Mausert v. Feigenspan*, 68 N. J. Eq. 671, 63 Atl. 610, 64 Atl. 801. In *Beach v. Palisade*

Reality & Amusement Co. *supra*, a second vice-president of a corporation was held to have had no authority, under a power to sign contracts in connection with the improvement, operation and maintenance of Palisade Park as an amusement enterprise to make a contract for the purchase of the corporation's own stock and bonds. In *Stokes v. New Jersey Pottery Co.*, 46 N. J. Law, 237, a president of a corporation was held to have had no power to give a bond and warrant to confess judgment against the corporation. In *Titus v. Cairo & Fulton Railroad Co.*, 37 N. J. Law 98, a power of attorney to sell the railroad company's bonds signed by the president was held invalid. These cases suffice to show that one dealing with a corporation must be apprised of the powers of the officers or agent purporting to act for the corporation, if he seeks to make a contract which will bind the corporation."

There remains still another reason why the alleged contract should not be enforced and why plaintiff in error cannot recover in this action, and that is that the record in our opinion discloses that there was an understanding between Bates and Early to divide any benefits that might accrue from the alleged contract. Let it be remembered that Oregon-American Lumber Co. was organized in June, 1917; that on the 31st day of July of that year it acquired the vast holdings of timber lands in Oregon, which are mentioned in the complaint; that Early was a director and vice-president of the company and the only officer or stockholder in the state of Oregon; Bates was a resident of Oregon, and represented Dubois, the party from whom these lands were purchased in the negotiations between him and defendant in error, and Early, so far as he participated in

these negotiations represented defendant but as soon as the deal was closed, Bates received a commission from Dubois, which he divided with Early, paying the latter \$17,000.00. (Tr. of Rec. 172.)

Now plaintiff in error alleges that immediately after defendant in error acquired title to these lands, he was employed by it to look after this property and to assist defendant in error in marketing the same, and in developing the property, marketing the timber thereon and in devising ways and means for securing the best possible returns from the property. This alleged employment, it is claimed was by a contract made by Early on behalf of defendant in error. By it Early attempted to arrogate to himself the authority of the board of directors of defendant in error and to turn over to Bates virtual control and management of this vast tract of timber lands and to confer upon him powers greater than were possessed by the general manager. It is claimed by Bates and Early that this was a continuous employment. If this were true, Bates would have occupied a position of trust with defendant in error and could not have accepted any employment from others in any matter that would conflict with the interest of defendant in error, and yet, it appears from the record that in the only instance in which defendant in error made any sale or disposition of any of its lands, viz: the sale to Inman-Poulsen Co., Bates represented the purchaser and instead of trying to secure the best return possible for defendant in error he sought to secure for Inman-Poulsen Co., the lowest price and best terms possible, and when this deal was closed Bates received a commission from Inman-Poulsen Co., \$17,000.00 of which he paid over to Early.

Again: In the negotiations for the sale of certain lands to B. L. Porter or The Kerry Timber Co., Bates received a letter from Porter authorizing him to offer defendant in error a specified price for certain timber lands, and throughout the negotiations which followed Bates represented the proposed purchaser and again sought to make the best possible bargain for such proposed purchaser, and at the same time Early and Bates were trying to secure  $2\frac{1}{2}$  per cent commissions to be paid to Bates if a sale should be consummated (Plaintiff's Ex. 4, Tr. of Rec. 228) which if received by Bates would no doubt have been divided with Early as had his commissions on other deals. And now plaintiff in error though he represented Porter and The Kerry Timber Co., throughout these negotiations has the temerity to claim from defendant in error commissions amounting to \$39,117.45.

One of the most remarkable things about this alleged contract is that it is claimed by plaintiff in error and testified to by Early that if the former succeeded in consummating a deal of sale or purchase or leasing, he was to be paid a commission, but if he did not succeed he was to be paid a reasonable compensation for his services and to be reimbursed his expenses. So no matter how any negotiations might terminate he would always be winner. With him, assisted by Early, it was "Heads I win, tails you lose."

We quote from the testimony of Early as to the Inman-Poulsen Co., deal, found on pages 209, 210 and 211, of the transcript of record.

Q. The commissions that were paid on these deals, did you get any portion of them?



A. Yes, sir. (188)

Q. How much? A. \$17,000.00.

Q. \$17,000.00. Was that during the time you were still an employee of the company, too?

A. Yes, sir, but I didn't make the price on the timber and had no understanding as to commission.

Q. Did you report that fact to any officer, or to your Board of Directors?

A. No, sir, because I didn't make the sale.

Q. Do you know who else shared in these commissions?

A. No, I do not.

Q. Do you know whether anybody else did or did not?

A. No, I do not.

Q. So as a matter of fact, while Bates represented Inman-Poulsen in the deal, and you now contend that the Oregon-American Lumber company had him under a course of general employment, and he at the same time in turn had you under employment? A. Who did?

.Q Bates? A. No, he did not.

Q. Well, he paid you \$17,000.00 anyway, didn't he?

A. Yes, he did.

Q. What for?

A. I don't know what for. He said simply he would have to pay it to the Government on his income tax if he didn't.

Q. You don't know what he paid it to you for at all?

A. No.

Q. You never even reported that to Mr. David C. Eccles did you? A. I did not do that.

Q. That was one of the things that you never took up with anybody in connection with the company? A. No. sir.

Q. Did you ever account to the company in the trust capacity that you then held as its vice-president—did you ever account to the company and turn back into its treasury this \$17,000.00?

A. No, sir, because I didn't take account of it. It didn't belong to them. (189.)

Bates as agent for Dubois negotiates the sale of over 27,000 acres of timber lands to defendant in error, for over three and a half millions of dollars in July, 1917. During these negotiations, Early as director and the vice-president of defendant in error, was ostensibly assisting defendant in error and acting in the interest of its stockholders, and dealing at arms length with Bates and his principal, Dubois. As soon, however, as the transaction was closed, Early was paid by Bates, a commission of \$17,000.00. Let it be remembered that Bates and Early both lived in the City of Portland, while all the other officers and stockholders of defendant in error lived in Utah. This being the situation, Early, acting on behalf of defendant in error, according to the complaint and his own testimony, attempted to commit defendant to one of the most extraordinary contracts it is possible to conceive—a contract which according to the testimony of Early, divested

the board of directors, and the general manager of defendant, of the control of the business of the corporation and invested Bates with power to make expenditures on behalf of defendant in error to an indefinite amount and to involve it in contracts and obligations mounting into millions of dollars; a contract authorizing Bates to negotiate for the purchase of railroads, for the leasing of railroads and the sale of all corporate property of the defendant in error, and all this and the terms of the contract resting in parol, and being done without the knowledge of any other director or officer of defendant in error, for Early testified that he did not consult any of the other directors, nor any other officer concerning this extraordinary contract. True he says he told D. C. Eccles of some of the activities of Bates, which he says were performed at his suggestion, but there is no evidence that he ever disclosed to any one that he had made or attempted to make any such contract as he says he made in August, 1917, or that he had assumed to make any contract with Bates.

The first item of alleged services under this alleged contract is set forth in paragraph 5 of the complaint and occurred on August 6, 1917, and, as is alleged resulted in securing for defendant in error an option to purchase a railroad and equipment for \$300,000.00. It does not appear that the directors of the Oregon-American Lumber company ever knew or heard of this transaction until this action was commenced. In paragraph 6 he alleges he negotiated for transportation facilities over a certain logging railroad and according to the testimony of Early this was at his request, and without the knowledge of the directors of defendant in error. There is not a syllable of evidence

that the directors of defendant in error desired to secure such transportation facilities.

In paragraph 7, it is alleged that plaintiff in error negotiated in September, 1917, for the purchase by defendant in error of a half interest in the Portland and Southwestern Railroad Co., and succeeded in securing an offer of the sale of such interest to defendant in error for \$140,000.00, coupled with an agreement to extend such railroad to the timber lands of defendant in error, the defendant in error to pay one half of the cost of such extension. All this was done without the knowledge of any other member of the board of directors of the defendant in error.

Can there be any doubt that the commissions paid by Bates to Early were paid for the purpose of inducing Early to enter into some arrangement by which Bates would receive large sums of money in the future from defendant in error? With all the other officers of defendant in error in Utah, and all its property in Oregon, Early, if he had possessed the authority to make the alleged contract, it would have been an easy matter for Bates with the assistance of Early to collect compensation from defendant in error upon every sale or purchase it might make, and could thus despoil the corporation of which Early was an officer.

The brief of plaintiff in error was not received by us until the foregoing portion of our brief was prepared and we have therefore had little opportunity to examine his brief, but we think it requires only very brief comment to show the fallacy of the contentions therein made.



Without attempting to examine in detail the statement of facts, we call the attention of the court to the fact that throughout the brief, counsel for plaintiff in error has intentionally or otherwise confused and confounded the Oregon-American Lumber Company, defendant in error, with the Oregon Lumber Company, another corporation, distinct from defendant in error.

Further there is no basis whatever for the claim that Chas. T. Early was general manager of defendant in error. On the contrary the articles of incorporation showed that David C. Eccles was the general manager and Early testified that the alleged contract was oral and made immediately after defendant in error obtained title to the property, and there is not a syllable of evidence that Eccles was consulted about the alleged contract.

The articles permitted the general manager to employ assistance under the direction of the board of directors. Early had no such authority, and yet it is claimed that he made on behalf of defendant in error a contract to pay compensation which was not fixed and under which contract plaintiff in error now claims \$75.00 per day for his services and also his expenses, where no deal was consummated, and where any deal was consummated he claims commissions.

True Early had been appointed what is commonly called "process agent," or agent upon whom process against the corporation could be served but he possessed no semblance of authority to bind defendant in error by any contract.

We shall not attempt a review of the authorities cited by counsel for plaintiff in error, but content ourselves with

saying that none of these support their contention. They are merely to this effect, that a general manager has power to bind the corporation in matters pertaining to the administrative conduct of the affairs of the corporation, that is in carrying out the business plans of the board of directors. A general manager however, has no power to determine the business policy of the corporation.

The defendant had just become the owner of a large tract of virgin timber lands, valued at millions of dollars. There is not a word of evidence in the record to show that the board of directors had, at the time the alleged contract of employment was made or attempted to be made by Early and Bates, determined to buy, build or lease any railroads or railroad, or to build or lease any sawmills. Indeed at that time it appears defendant in error had not made any plans for the development, sale or disposition of any of these timber lands. Early testified (Rec. 140) that the first business that was done by the corporation after acquiring these timber lands was to arrange with Mr. Bates to look up the McCormick property and the Portland & Southwestern Railroad, and that he made those arrangements. This is the transaction referred to in paragraph 5 of the second amended complaint, in which it is alleged that plaintiff in error secured an option in favor of defendant in error, to purchase a railroad for \$300,000.00. There is no evidence that the board of directors desired to purchase that or any other railroad.

It is an astounding proposition that to buy, build or lease railroads; to sell the corporate stock of the corporation, owned by it or its stockholders, or to sell its timber lands, is an ordinary administrative function, and there-

fore within the apparent authority of the vice-president or even the General Manager. We think no authority for any such doctrine can be found, and certainly none has been cited.

How then could Early bind the corporation to pay for services of any one, in securing an option to purchase this railroad? If the board of directors had determined to buy this railroad if a satisfactory price or offer could be obtained and had directed the general manager to negotiate for such purchase, that might lend some color to the claim that in employing Bates, the general manager, was only performing the ordinary administrative duties assigned to him, but this would confer no authority on Early, for Eccles and not he was general manager.

The same is true concerning the alleged negotiations with Coleman H. Wheeler, set out in paragraph 6 of the second amended complaint, and of the transactions set out in paragraphs 7 and 9. And so far as any negotiations for the sale of any of the lands of defendant in error is concerned it appears affirmatively that the corporation did not contemplate or desire to sell any of its lands, until late in the fall of 1920, but on the contrary was trying to finance its development but had not succeeded. (Rec. Page 221) So that during all the time Bates and Early claim the former was employed to buy or lease railroads, and to sell large tracts of land for defendant in error, there was no desire on its part to sell any of its property, and it did not have the means to develop it, but was trying to raise means for that purpose.

It is difficult to understand how it can be claimed that Bates is entitled to commissions on the sale of stock to Central Coal & Coke Co., for Early testified that Mr. Eccles had had that matter up with Mr. Keith a long time prior to Bates attempting to interest Keith or his Company (Record Page 176.)

It is still more difficult to understand the contentions made on page 32 of the brief of plaintiff in error, that the defendant in error ratified the numerous acts of Early by making a sale of certain lands to Inman-Poulsen Company, for it is undisputed that in that transaction Bates represented Inman-Poulsen Co., and not defendant in error. So too in the Kerry Timber Co. negotiations, Bates represented Porter and the Kerry Timber Co., and all that Early did was done under directions of the board of directors of defendant in error, acting through Mr. DeVine.

There was no ratification of the alleged act of Early in making the alleged contract with Bates, or in consummating a lease with the United Railway Company, for there is no evidence that the directors knew anything about the alleged contract with Bates, nor that they knew Bates had done or claimed to have done anything to bring about the leasing of this railroad.

It is passing strange that if Bates had any such contract as he alleged, he never for more than three years presented any bill or claim for services or even for his expenses.

To summarize:

First—There is not only an entire lack of evidence to show that Early had any authority to enter into the alleged contract on behalf of defendant in error, but it appears



affirmatively that he had no such authority, and that the board of directors never heard of such contract.

Second—That even if Early had any such authority the contract was void under subdivisions 1 and 8 of Sections 808, L. O. L.

Third—That Bates was engaged in the business of a real estate broker and at no time had license as such broker and that he therefore cannot recover any commissions for negotiating for the purchase or sale of real estate.

Fourth—Even if any such contract was entered into between Early and Bates, it was conceived in fraud and conspiracy which renders it absolutely void and not binding on the defendant in error.

We respectfully submit that the judgment of this district court is both lawful and just and should be affirmed.

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IN THE  
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**of Appeals**  
NINTH CIRCUIT

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PAUL C. BATES,

Plaintiff in Error;

vs.

OREGON-AMERICAN LUMBER COMPANY,

Defendant in Error.

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**Reply Brief of Plaintiff in Error.**

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Defendant in Error.

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Defendant in error has urged a number of reasons for affirmance of the judgment rendered in the trial court. Some of these reasons plaintiff in error does not believe are before the Court. The trial court directed a verdict in favor of the defendant in error, upon the sole ground of want authority of Mr. Early to hire the plaintiff in error, and plaintiff in error was under the impression that this would be the only point raised upon the appeal and this was the only point briefed by the plaintiff in error. Defendant in error did not file a cross appeal, and in order that plaintiff in error's contention may be before the Court, we respectfully submit the following statement and authorities in reply to the brief of defendant in error.

It is claimed that because the plaintiff in error's complaint does not allege that plaintiff had a broker's license it does not state a cause of action, but this, we take it, would be a matter of defense. It is alleged in the Answer as an affirmative defense and

there is no evidence in this case that plaintiff in error is without a license.

Opposing counsel, on page eleven of their brief, admit that this would not prevent the maintenance of such an action in the Federal Courts, but seek to avoid the force of this rule by invoking another rule to the effect that when the statute declares it unlawful and fixes the penalty for the doing of certain things, the contract to do such prohibited things is void, even though not so declared by the statute.

The Broker's Act was passed by the Legislature of the State of Oregon in 1919. The contract sued upon in the complaint was entered into in 1917, two years prior to the enactment of the Broker's Act. The plaintiff in error had entered into a general contract of hiring, as a special agent, and for two years he had performed services under this contract of hiring. It certainly cannot be contended or argued that this Act could wipe out the plaintiff in error's right to recover for services performed prior to its enactment. The statute itself does not seek to effect any existing contracts, and this contract having been in existence at the time of the enactment of the statute and the parties having operated under it for a period of two years, it cannot be claimed that the act would be applicable under such a state of facts.

Furthermore, the evidence would have disclosed that the plaintiff in error is not in the real estate business, never has been in the real estate business and was not engaged in the real estate business at the time of his employment by the defendant in error.



Mr. Justice Wolverton, in passing on the demurrer to the complaint, which demurrer raised the question as to the sufficiency of the complaint, the opinion being found on Page 21 of the Transcript of Record, uses the following language:

WOLVERTON, District Judge.—This is a demurrer to the amended complaint, predicated upon the assumption that plaintiff was a real estate broker at the dates set out therein, and was acting in that capacity while in the employ of defendant and doing the things for which he is seeking to recover compensation, and that he was not licensed as such.

The plaintiff sets forth that defendant, during August, 1917, having purchased a large tract of timber-land, employed him to assist and aid in developing the property and the timber thereon, and in devising ways and means of securing the best possible returns, and agreed to pay him for his services and to reimburse him for expenses incurred in connection therewith. Some fifteen specifications of services rendered are alleged in the complaint, as to nearly all of which, if not all, reasonable compensation is demanded.

Section 808, Sub. 8, Lord's Oregon Laws, being a clause of the statute of frauds, was amended in 1917 (Sess. Laws 1917, p. 786), providing the manner of note or memorandum that shall be sufficient where an agent or broker is employed to sell or purchase real estate for another. In 1919 (Sess. Laws 1919, p. 238), an act was passed defining a real estate broker, and licensing (25) him to transact business as

such. This act was superseded by act of the Legislative Assembly in 1921, Sess. Laws. 1921, p. 438.

It will be seen from this series of acts that, while the style of agreement required on the part of real estate brokers was defined by law prior to the time plaintiff alleges he entered into the agreement of employment set forth in the complaint, namely, August, 1917, the acts requiring such persons to be licensed were adopted two and four years subsequent thereto. However, plaintiff was bound, if a real estate broker, to the observance of the statute of frauds as a prerequisite to maintaining his action. Whether the later acts are retroactive in their operation need not be discussed, in view of the conclusion I have reached touching the purpose and effect of the complaint.

Was the plaintiff a real estate broker, in view of the allegations of his complaint?

A review of the allegations of employment and specifications of services performed renders it obvious that plaintiff was not employed to sell or purchase specific tracts of realty designated by the defendant, with fixed commissions or compensations, but to collaborate with defendant in managing its property and assisting in disposing of or purchasing certain holdings. Plaintiff had no authority to buy or sell, except as his employer might direct and approve, and was always subject to his employer's directions in whatever he did in relation to the management, purchase or disposition of any real property in which it might be, or desired to be, concerned. In other words, plaintiff's employment

was that of an agent, subject to specific instructions and directions, and his services were rendered in pursuance thereof. He cannot, therefore, be classed as a real estate broker, within the purview of the acts of the Legislative Assembly above noted. Nor does agreement for his general employment fall within the restrictions of the statute of frauds. *Sherman v. Clear View Orchard Co.*, 74 Ore. 240; *Western Lumber Co. v. Willis*, 160 Fed. 27; *Springstein v. Lewis*, 259 Fed. 518.

Demurrer overruled."

The opinion of Justice Wolverton sets forth the theory of plaintiff's complaint. The plaintiff in error was not employed as a real estate broker, but he was employed as any other employee would be employed. His time was always at the beck and call of defendant in error and he worked for a period of three and a half years in assisting and collaborating with the defendant in error in handling, managing and eventually disposing of its property. Defendant in error admits in the brief, page 12, that plaintiff in error could recover, so far as the question of real estate broker is concerned, for services performed before the passage of the act of 1919, but again seek to avoid the force of this rule by claiming that since plaintiff in error has treated the contract as an entire contract he cannot recover for any of his services.

Section 8313 of Oregon Laws provides: "Nothing contained in this act shall be construed as prohibiting or regulating detached transactions for the purchase, sale or rent of real

estate by persons not engaged in the real estate business as a principal or partial vocation.”

The evidence would have disclosed and defendant in error could not have established that the plaintiff in error was ever engaged in the real estate business prior to the transaction in question. This was simply an isolated detached transaction, and plaintiff was not hired as a real estate broker, but was hired, as Mr. Justice Wolverton says, to collaborate with the defendant in error and under special powers and authority.

9 Corpus Juris, page 510, defines a real estate broker as—

“a person who is, generally speaking, engaged in the business of procuring purchases or sales of lands for third persons on a commission contingent on success.”

Again, 9 Corpus Juris, page 559, provides that—

“A statute precludes a broker from recovering commission unless his authority is in writing is in derogation of the common law and must be strictly construed; and hence such a statute will not apply to cases which are not strictly within its terms.”

Again, this same authority, 9 Corpus Juris, page 565, in speaking of the business of a broker as affected by a license and after stating when a license is necessary, states the following rule:

“This rule does not apply to one who is not a regular broker but acts only in an isolated case.”

And again this same authority, 9 Corpus Juris, page 513, uses the following pertinent language:



“One who, while engaged in other business, makes a single or occasional sale or other transaction for another under a special contract is not a broker and is not required to take out a license as such.”

A case very much in point decided by the Supreme Court of the State of Oregon is that of *Sherman vs. Clear View Orchard Company*, 74 Ore. 240, in which the doctrine is laid down quoting from the syllabus:

“A contract by an orchard company employing plaintiff to act as sales manager, organize a selling department, select suitable agents, and manage the company’s selling force for a commission of 5 per cent on sales made by such agent or by himself was not a contract for the employment of an agent to sell real estate, and was therefore not invalid because not in writing, under Subdivision 8, Section 808 L. O. L., providing that an oral agreement, authorizing or employing an agent or broker to sell real property on commission, shall be void.”

It appeals to us that this case meets every contention raised by defendant and places the plaintiff beyond the pale of the Broker’s License Act of this State.

In the case of *Western Lumber Company vs. Willis*, 160 Federal, page 27, the 9th Circuit had under consideration a state of facts as follows:

The plaintiff was hired to point out certain timber lands for defendant, which lands were subject to reservation script. This timber land was to be pointed out to a timber inspector of the defendant

company. For such services plaintiff was to be paid one dollar per thousand feet for every thousand feet of timber or land so pointed, less the cost of purchasing the script necessary to select, locate and acquire such lands. The plaintiff performed these services and brought an action to recover, and the defense was raised that this constituted a broker's contract. But the Circuit Court of Appeals, speaking through Justice Morrow, held that the plaintiff was not employed as an agent or broker and that this was not a broker's contract.

Again in the case of *Springstein vs. Lewis*, 259 Federal, page 518-521, Judge Gilbert had under consideration a case where a man in Alaska had made a sale of real estate, and it was contended in defense that he did not have a real estate broker's license. The plaintiff was a merchant and the Court enunciated the following rules:

"We find no merit in the contention that the plaintiff is not entitled to recover a commission for the reason that he had no license as a broker under section 2569, Compiled Laws of Alaska. The plaintiff was not engaged in the business of a broker. He was a merchant, and there is no evidence that he ever attempted to make a sale of real estate other than that which is here involved.

In 9 C. J. 513, it is said:

"One who, while engaged in other business, makes a single or occasional sale, or other transaction for another, under a special contract, is not a broker, and is not required to take out a

license as such." *Smith v. Sharpe*, 162 Ala. 433, 50 South. 381, 136 Am. St. Rep. 52; *O'Neill v. Sinclair*, 153 Ill. 525, 39 N. E. 124; *Pope v. Beals*, 108 Mass. 561; *Woods v. Heron*, 229 Pa. 625, 78 Atl. 1128; *Johnson v. Williams*, 8 Ind. App. 677, 36 N. E. 167.

It will be noticed that Judge Gilbert states there was no evidence that the plaintiff had ever attempted to make a sale of real estate other than that which was involved. This may be said of the plaintiff, Mr. Bates. The complaint does not show that he ever made a real estate sale or transaction prior to entering into this contract with the defendant.

The criterion, as we take it, is—What was Mr. Bates' business at the time he entered into this contract with the defendant? Was his business at that time that of a real estate broker or was his business something else? The statute says that a real estate broker is one whose business is—etc. In the absence of any statement in the Amended Complaint that Mr. Bates was engaged in the real estate business prior to the making of this contract, how can it be contended that Mr. Bates was a real estate broker? In the absence of any statement in the Amended Complaint that Mr. Bates was a real estate broker this court cannot assume that such was his business, and the fact is that he was never engaged in the real estate business prior to this particular transaction, if this could be considered real estate business.

In the case of *Meyer vs. Wiest*, 250 Pennsylvania State, 576, the Supreme Court of Pennsylvania

had under consideration a like state of facts and used the following language:

“Neither this act nor prior legislation prohibits a person whose business or occupation is not that of a broker from receiving compensation for services rendered in single transactions of buying or selling real estate, or other property, for another.”

And again in the case of Pierson vs. Donham, 104 N. E., 606, the Appellate Court of Indiana had under consideration a contract wherein the plaintiff was hired and employed to find, locate and obtain an option for the purchase of certain lands in the city of Terre Haute. The Court uses the following language:

“The complaint is in one paragraph, and in substance states that in 1909 defendant employed plaintiff to find, locate and obtain an option of purchase of certain land in the city of Terre Haute, to be used as a lumber yard; that he accepted the employment and performed said services; that the price of the real estate was \$13,500; that defendant approved the arrangements and contracts made by plaintiff in his behalf in pursuance of said employment and approved the price agreed upon for the property; that his services were reasonably worth 5 per cent. of the amount of the purchase price of said property, and the same is due and unpaid. Prayer for the judgment against defendant for \$675.00.

Appellants contend that the complaint is bad because it does not show that the contract for the real estate was in writing, and cites section 7463, Burn's Statutes 1908, in support of the



contention. It is also claimed that the complaint attempts to plead a special contract and fails to aver any definite arrangements to pay anything for the alleged services; that there can be no recovery on the quantum meruit, because it is an attempt to plead a special contract.

The complaint alleges in substance an employment to render certain services, and charges that the services were rendered by the plaintiff and sanctioned and approved by the defendant. The complaint is good as a common count, on the quantum meruit, for the services rendered in pursuance of the employment."

In the case of *Chadwick vs. Collins*, 26 Pa. St. Rep. 138, the court used the following language:

"From the bill of exceptions we learn that the suit was brought to recover a sum of money which the defendant had agreed to pay to the plaintiff for obtaining a purchaser for certain real estate of the defendant in the city and county of Philadelphia. The allegation is, that the plaintiff was not a licensed real estate broker, and that therefore he could not recover for services rendered in selling real estate \* \* \*

"In making the use or exercise of the business of occupation of real estate brokers in Philadelphia and Pittsburgh a source of revenue to the Commonwealth, the legislature did not intend to prevent a person whose business or occupation was not that of a real estate broker from receiving compensation for services rendered in buying or selling real estate belonging to another.

"Any person may lawfully employ one who is not a real estate broker to buy or sell real

estate, and where such employment takes place, and labor is done under the employment, it must be paid for; at all events, the law will not lend its aid to the employer to defraud the employee out of his just reward."

In the case of *Johnson v. Williams*, 36 N.E. 167, an Indiana case, the court used the following language:

"The contention of counsel for appellant is that the appellee was not entitled to recover because he was not acting as a broker, contrary to sections 2090, 5269, 5274, Rev. St. 1881. We think it unnecessary to pursue and determine all the questions so ably presented by counsel for appellant, for the reason that counsel's reasoning is predicated upon a state of facts contrary to what is shown by the record in this case. In determining the correctness of the conclusions of law drawn by the court, we can look simply to the facts found by the court, within the issues. Had the court found as a fact that the appellee was acting as a broker in making the sale of bank stock for appellant, we would probably be called upon to put a construction upon the sections of the statute supra. However, the court found as a fact that the appellee 'was not engaged in a regular business of stock and exchange broker.' Whether or not he was so engaged is a question of fact to be determined from the evidence, and the appellant does not question the correctness of the facts found. The court having found that he was not acting as a broker, the conclusions were right. The court did not err in its conclusions of law. Judgment affirmed."

Again, in the case of *Merced County v Helm et al*, 36 Pac. 399-400, a California case, the court uses the following language:

“The county of Merced passed an ordinance fixing the rate of county license taxes upon certain occupations within the county, and providing for the collection of the same by suit, in case the persons liable to pay the tax should engage in any business subject thereto, without having first procured a license therefor.”

\* \* \*

“The distinction between a single act and the business in which the act is done is very marked, and is well recognized in adjudged cases. *Weil v. State*, 52 Ala. 19; *Merrit v. State*, 19 Tex. App. 435; *Williams v. State*, 26 Tex. App. 131, 9 S. W. 357; *Jensen v. State*, 60 Wis. 577, 19 N. W. 374. A single act does not constitute a business; and when a sale is but an incident in, or the final act of, another business, it cannot be said to be the business which is carried on and transacted.”

In the case of *Clark v. Freeport Mining Company*, 52 Pa. Superior Ct. 1-5, the court used the following language:

“We do not find in the testimony such evidence as would have authorized the court to hold that the plaintiff was a broker in the transaction of which this action arises, and that he could not recover on the contract because he had not paid a license as broker. Occasional transactions by an attorney on behalf of a client in the investment of money are incidental to his principal business, and are not regarded as con-

stituting him a broker under the Act of May 7, 1907, Ph. 175. It does not appear that he held himself out as one engaged in a brokerage business or that the negotiations of loans constituted his business. At any rate the question was one for the jury and not for the court."

In the case of *Bollin v. State*, 192 S. W. 196, an Arkansas case, the court used the following language:

"It is also insisted that the court erred in excluding proof that Blocker has no license as a broker to deal in real estate in the city of Ft. Smith. In the first, place, Blocker was not a real estate broker. He was engaged in other business, and this was a single transaction by him. Moreover, the provision of the ordinance referred to did not provide that contracts made by real estate brokers without a license should be void."

In the case of *Black v. Snook*, 53 Atlantic Rep. 648, a Pennsylvania case, the court uses the following language:

"A person who sells real estate for another under a special contract, without holding himself out to be a real estate broker, may recover, though he had not complied with the act requiring real estate brokers to take out a license."

In the case of *O'Neill v. Sinclair*, 124 N. W. 124, the Illinois Supreme Court uses the following language:

"One who, while engaged in other business, negotiates a sale of land for another, is entitled to compensation, even though he has no license, and though there is in the city where the trans-



action occurred an ordinance declaring it unlawful to exercise within the city the business of real estate broker without a license therefor; since effecting a single sale does not constitute the exercise of the business of real estate brokerage.”

In the case of *Smith v. Sharp*, 50 South, 382-384, the Alabama Supreme Court uses the following language:

“This action was brought by the appellant against the appellee to recover \$1000 claimed to be due to the plaintiff as a broker for services rendered in and about a sale of certain property which belonged to the defendants. The defendants interposed a plea of the general issue, and also a special plea, to the effect that plaintiff had not taken out a license as a real estate broker.”

\* \* \*

“The fact that Smith had not taken out license as a broker did not invalidate his contract. *Sunflower Lumber Co. v. Turner Supply Co.* (Ala.), 48 South, 510. The evidence showed, at any rate, that he was not engaged in that business.”

Again, in the case of *Ord v. Baizley*, 62 Pa. Superior, 395, the Pennsylvania court uses the following language:

As held in *Chadwick v. Collins*, 26 Pa. 138, practically there is no difficulty in ascertaining who are engaged in the business or occupation of brokers—it is those who hold themselves out to the public as such, generally having offices or places of business, the character of which is

indicated by clear and unmistakable evidence. *Gedinsky v. Strouse*, 6 Pa. Sup. St. 587; *Raeder v. Butler*, 19 Pa. Supt. Ct. 604. The sale in this instance was an isolated and personal negotiation."

The foregoing authorities conclusively show that assuming that the cause of action involved a real estate transaction, no broker's license was required by reason of Chapter 15 Oregon Laws, relating to the regulations of the business of real estate brokers, but plaintiff most emphatically insists that his cause of action is not one involving real property. Plaintiff's cause of action had its inception in the agreement set out in paragraph IV of plaintiff's amended complaint. This was a special contract of hiring to perform numerous things to be at the beck and call of the defendant to perform any service that might be required of him. The matters thereafter set out simply show what was done pursuant to this special contract of hiring and these specifications are not plaintiff's causes of action, and as a matter of fact could have been eliminated from the complaint in the absence of a motion on defendant's part to make our complaint more definite and certain. It must be borne in mind that this is not an agreement upon the merits of this case, but an objection to the complaint, and unless the complaint in its entirety fails to state a cause of action or eliminates a necessary allegation in order to enable plaintiff to recover, the complaint should be sustained. As said in *Jackson v. Stearnes*, 48 Oregon, 25-28, point 3:

“The demurer interposed in the case at bar was general, and if any part of the complaint herein states facts entitling the plaintiff to equitable relief, the challenge submitted to his primary pleading for insufficiency should have been overruled. \* \* \* Bliss, Code Pl. (3d Ed.) 8417; 6 Ency. P. and Pr. 346; Wagg v. Scott, 29 Ore. 386 (45 Pac. 774).”

Defendant's counsel at some length argue many different propositions of law which under our version are not within the scope of this appeal.

For ought that appears upon the face of this complaint the entire transaction set out in plaintiff's complaint had been fully completed before the passage of the real estate broker's statute.

To recapitulate our position we have this to say: First, plaintiff's cause of action is based upon a special contract of hiring. Second, assuming which we most positively deny, that this was a real estate transaction, the complaint does not show that the cause of action herein relied upon was other than an isolated or occasional transaction, and therefore, under the authorities heretofore cited was not within the purview of Chapter 15, Oregon Laws. Third, our action does not proceed upon a real estate transaction and therefore the Statute of Frauds is in no wise involved in this case.

It is next urged by defendant in error that the statute of frauds is applicable to this case, but plaintiff's contract, as we have sought to show heretofore, was not an agreement for the employment of an agent or broker to sell real estate. Further-

more, plaintiff in error is not required to allege in his complaint that the contract was in writing or oral. There is nothing in the evidence to disclose that this contract was oral. As a matter of fact, if the question had been raised the plaintiff in error would have been able to produce abundant written evidence of his hiring, but as before stated and as set forth in the opinion by Justice Wolverton, this is not a contract coming within the purview of the statute of frauds.

Sherman v. Clear View Orchard Co., 74 Ore. 240.

Western Lumber Co. v. Willis, 160 Fed. 27.

Springstein v. Lewis, 259 Fed. 518.

Much is said in defendant in error's brief regarding *this unusual and extraordinary contract*; but what is there unusual or extraordinary in this contract? The contract was not made for any definite period. It could be terminated any day by the officers of defendant in error. It could be terminated by plaintiff in error upon a moment's notice. It is not a contract for life or an obligation binding the defendant company for years to come. The plaintiff in error, as the complaint sets forth and the record discloses, labored the same as any other person would labor under like circumstances. The contract was a usual and common contract, taking into consideration the purposes for which this property was acquired. Charles T. Early testified that he was the general manager of the company. The evidence is conclusive that he reported to the pres-



ident, David C. Eccles. The evidence also discloses that David C. Eccles knew of the employment of the plaintiff in error and knew that plaintiff in error was performing services for his company. The evidence discloses that the president and plaintiff in error at various times interviewed each other regarding the transactions set forth in the complaint, and the president accompanied the plaintiff in error on various trips while the plaintiff in error was in the performance of his duties.

It is said, page 64 of the brief of defendant in error:

“An inspection of the Articles of Incorporation of this Compan shows that David C. Eccles was president and general manager and Charles T. Early was vice-president of this corporation at the time this contract was alleged to be entered into, to-wit, August, 1917.”

So far as the plaintiff in error is concerned, it makes little difference whether Mr. Early or Mr. Eccles was the general manager. Both of these parties knew of this employment. Mr. Early says he made the contract with the plaintiff in error and reported to the president, who, it is claimed, was the general manager.

#### POINTS AND AUTHORITIES.

The plaintiff in error never having been engaged in the real estate business and there being no evidence in the record that he ever engaged in the real estate business, and this being a mere isolated transaction and his employment being that of a

special agent and not as a broker, the broker's act does not apply.

Sherman v. Clear View Orchard Co., 74 Ore. 240.

Western Lumber Co. v. Willis, 160 Fed. 27.

Springstein v. Lewis, 259 Fed. 518.

9 Corpus Juris, pages 513-559-565.

Meer v. Weist, 250 Pa. Ct. 576.

Pierson v. Donham, 104 N. E. (Ind.) 606.

Chadwick v. Collins, 26 Pa. St. 138.

Johnson v. Williams, 36 N. E. (Ind.) 167.

Merced County v. Helm, 36 Pac. (Calif.) 399-400.

Bollin v. State, 192 S. W. (Ark.) 196.

Black v. Snook, 53 Atl. (Pa. St.) 648.

O'Neill v. Sinclair, 124 N. W. (Ill.) 124.

Smith v. Sharp, 50 So. (Ala.) 382-384.

The reply alleges that the defendant in error took the fruits and benefits of plaintiff in error's work and that because of it having accepted his labor and service it had ratified the acts of Early and Eccles in hiring him. This ratification dates back to the original hiring and creates an estoppel, all of which was for the jury, it being a general rule of law that a ratification by a principal of the unauthorized acts of its officer relates back to the original transaction and establishes the agency.

Emmett vs. Astoria Marine Iron Works, 97 Ore., 632; s. c. 192 Pac. 1113.

The contract set forth in the complaint was entered into in 1917. The broker's act did not become effective until 1919, two years afterward, and would not apply to a contract entered into previously.

Bonner's Law Dictionary, Vol. 3 (Rawle's Third Revision) page 2950.

White vs. United States, 1919 U. S. 545-551.

United States Fidelity So. vs. Struthers Wells Co. 209 U. S. 306-314.

A license to act as a broker is presumed and want of a license is a matter of defense.

Shepler vs. Scott, 85 Pa. St. 329-331.

Sprague vs. Reilly, 34 Pa. Superior Ct. 332-334.

Munson vs. Fenno., 87 Ill. App. 655-657.

The statute of frauds has no application to this case, because this is not a real estate transaction, but constitutes a general hiring of the plaintiff in error.

Sherman vs. Clear View Orchard Co. 74 Ore. 240.

Western Lumber Co. vs. Willis, 160 Fed. 27.

Springstein vs. Lewis, 259 Fed. 518.

In the brief of defendant in error something is said of a conspiracy entered into by and between the plaintiff in error and Charles T. Early to defraud this defendant in error Company. It is even insinuated that plaintiff in error and Mr. Early were in collusion.

The fact is that the defendant Company has never paid to the plaintiff in error one cent for his services which he has rendered. When the property was originally purchased, Mr. Bates, after a consultation with the president of the Company, David C. Eccles, and Mr. Early, did give to Mr. Early a gratuity. This was Mr. Bates' money and he could do with it as he pleased. The money was only taken

by Mr. Early after the president advised him to receive same. And this money so paid to Mr. Early was not the money of defendant in error. It is in evidence that a portion of this property was sold to the Inman-Poulsen Lumber Company, for the sum of about a million dollars. This sale was made, as the evidence discloses, through the efforts of Mr. Bates—was ratified and consummated by the board of directors of the defendant in error Company, and Mr. Bates for his services was paid a certain sum by the Inman-Poulsen Lumber Company, of which Company Mr. Poulsen is the president and is the father-in-law of Mr. Bates. The evidence would have disclosed that this Inman-Poulsen transaction was authorized and consummated by the defendant in error Company, and Mr. Bates' services, instead of being paid for by the defendant in error Company, were paid for by the father-in-law of Mr. Bates, and out of this money which belonged to Mr. Bates a portion was given to Mr. Early.

The evidence also shows that a binding contract had been entered into with the Kerry Lumber Company for \$3.15 per thousand, but this contract was not consummated by the defendant in error Company, and finally the property was sold to the Central Coal & Coke Company, with the exception of twenty per cent., for a total value of seven million dollars. Thus, we have here a company paying three million six hundred fifty thousand dollars for property which they held for a period of a little over three years and sold for eight million dollars and



still retain twenty per cent. of the property; and defendant in error makes the bold allegation that a conspiracy was entered into between Mr. Early, who had been in the employ of this Company for over thirty years and had more to do with making this company and its prosperity than any other officer of the Company, whose acts, as he says, had never been questioned during the years of his employment, and whose services were highly and favorably commended by the board of directors of the Oregon Lumber Company at the time of his resignation, and Mr. Bates to defraud defendant in error.

It is said in the brief of the defendant in error that there is a distinction between the Oregon Lumber Company and the Oregon-American Lumber Company, but the record shows that the stockholders were identical; that the officers of the two companies were the same, and this property was originally purchased with the intention of having it conveyed to the Oregon Lumber Company, but instead this new company was formed for the purpose of development.

We respectfully submit that after the performance of the services by plaintiff in error and after this defendant in error has taken the fruits and benefits of his labors, defendant in error ought not now to be permitted to say that the original hiring of the plaintiff in error was beyond the scope of Mr. Early's or Mr. Eccle's authority.

As stated in defendant in error's brief, the property of the defendant in error was all in the State

of Oregon. Mr. Early was the only officer and agent of that company in this State and he handled its property, looked after its assets, and who would not be justified in assuming that he had authority to make contracts of hiring such as plaintiff in error claims in this case.

We respectfully submit that these questions should have been submitted to the jury.

WILBUR, BECKETT & HOWELL,  
F. S. SENN,

Attorneys for Plaintiff in Error

**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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H. O. HARRISON COMPANY, a Corporation,  
Plaintiff in Error,  
vs.

THE UNITED STATES OF AMERICA,  
Defendant in Error.

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**Transcript of Record.**

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Upon Writ of Error to the Southern Division of the  
United States District Court of the  
Northern District of California,  
First Division.

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FILED

AUG 14 1923

F. D. MONROE





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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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UNITED STATES ATTORNEY, S. F.

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In the Southern Division of the United States  
District Court for the Northern District of  
California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant,

and

H. O. HARRISON CO., a Corporation,

Applicant.

**Praeceptum for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, as a transcript of record in said cause.

Information; order for sale of automobile; application for allowance of lien; notice of hearing application for allowance of lien; order and opinion denying application for allowance of lien; petition for writ of error; bond on writ of error; assignment of error; writ of error; bill of exceptions; citation on writ of error; praecipe for appellate record; clerk's certificate on printing of record.

W. C. BACON,

REDMAN & ALEXANDER,

Attorneys for Plaintiff in Error.

[Endorsed]: Filed Jul. 6, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1\*]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

### **Information.**

At the November term of said court in the year of our Lord one thousand nine hundred and twenty-two

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\*Page-number appearing at foot of page of original certified Transcript of Record.

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Special Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into court on this the 14th day of February, 1923, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows to wit:

That the allegations hereinafter set forth each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents:  
THAT

**JACK MODESTI**

hereinafter called the defendant, heretofore, to wit, on or about [2] 14th day of December, 1922, at ——— in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court did then and there transport certain intoxicating liquor, to wit, 2 5-gal. bottles of what is called jackass brandy then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the transporting of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided. [3]

### SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW THEREFORE, your informant presents:  
THAT

### JACK MODESTI

hereinafter called the defendant, heretofore, to wit, on or about the 14th day of December, 1922, at ——— in the city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit: 2 5-gal. bottles of what is called jackass brandy then and there containing one-half of one per cent or more of alcohol by volume which



was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National *Prohibition against* the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,

United States Attorney.

KENNETH M. GREEN,

Special Assistant U. S. Attorney. [4]

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

George Neary being first duly sworn deposes and says: That Jack Modesti on or about the 14th day of December, 1922, at city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there on the premises *aforesaid* certain intoxicating liquor, to wit: 2 5-gal. bottles of what is called jackass brandy then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the transporting of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful

and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act,"

And affiant on his oath aforesaid further deposes and says: THAT

**JACK MODESTI**

on or about the 14th day of December, 1922, at city and county of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, 2 5-gal. bottles of what is called jackass brandy then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

**GEORGE NEARY.**

Subscribed and sworn to before me this 13th day of February, 1923.

[Seal]

**C. M. TAYLOR,**  
Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed Feb. 15, 1923. W. B. Mal-  
ing, Clerk. By Lyle S. Morris, Deputy Clerk.  
[5]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

**Order of Sale of Property Seized.**

It appearing to the satisfaction of the Court that the above-entitled defendant was on the 17th day of March, 1923, convicted of illegally transporting intoxicating liquor in a certain automobile hereinafter described, which said automobile was, at the time of the arrest of said defendant, seized by and still is in the possession of the Federal Prohibition Director for the State of California, and no good cause to the contrary being shown by the owner of said automobile;

IT IS HEREBY ORDERED that said automobile, to wit, an Essex Touring Car, License No. 604483, be sold at public auction by the United States Marshal for the Northern District of California, at the United States Post Office Building, 7th and Stevenson Streets, city and county of San Francisco;

IT IS FURTHER ORDERED THAT the said marshal, after deducting the expenses of keeping the said automobile, fee for the seizure and the

cost of the sale, shall pay all liens, according to their priorities, which are established as being *bona fide* and as having been created without the lienor having any notice that the said automobile was being used or was to be used for the illegal transportation of liquor at the time of the seizure thereof, and shall pay the balance of the proceeds into the [6] Treasury of the United States as miscellaneous receipts.

R. S. BEAN,

United States District Judge.

Dated: March 22, 1923.

[Endorsed]: Filed Mar. 22, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

**Application for Allowance of Lien Upon Seized Property.**

Comes now H. O. Harrison Co. and in support of this application for a lien against the Essex automobile seized by the United States Govern-



ment in connection with the arrest of the above-named defendant or against the proceeds of the sale of said automobile, alleges as follows:

1. That applicant is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of California and engaged therein in the business of selling automobiles.

2. That on or about the 14th day of April, 1922, applicant sold an Essex touring automobile, 1922 model, Factory No. 611287, Motor No. 71226 to Jack Modesti, defendant above named, under a conditional sales contract under the terms of which title was retained by applicant until the purchase price was fully paid. That before the completion of the payments by said Modesti provided in said contract and while said contract was in full force and effect and on or about the 14th day of December, 1922, said Modesti was arrested charged with the transportation of intoxicating liquor in violation of the Federal Prohibition Act and said automobile was seized by duly authorized agents of the United States Government. That on or about the 17th day of March, 1923, said defendant Modesti was [8] convicted and fined in the above-entitled court and action.

3. That the unpaid balance due and to become due under said contract from said Modesti to applicant at the time of said seizure is the sum of One Hundred Ninety-eight and 06/100 (\$198.06) Dollars and accrued interest at the rate of 8%

from April 14, 1922, the date upon which said payments became due.

4. That applicant had no knowledge or reason to believe that said automobile would be used for transportation purposes in violation of the Federal Prohibition Act and that applicant had no notice that said vehicle was being used or was to be used for illegal transportation of liquor or for any purpose in violation of law.

WHEREFORE, applicant prays for the allowance of a lien in its favor in the sum of One Hundred Ninety-eight and 06/100 (\$198.06) Dollars and accruing interest at the rate of 8% from April 14th, 1922, against the said Essex touring automobile herein described or against the proceeds of the sale of said automobile pursuant to the statute in such cases made and provided.

H. O. HARRISON CO.

By REDMAN & ALEXANDER,  
Attorneys for Applicant. [9]

United States of America,

State of California,

City and County of San Francisco,—ss.

A. L. King, being first duly sworn deposes and says: That he is the auditor of H. O. Harrison Co., the applicant named in the foregoing application, and is authorized to verify said application; that he has read said application and knows the contents thereof; that the *said* is true of his own knowledge except as to the matters therein

stated on information and belief and that as to those matters he believes it to be true.

A. L. KING.

Subscribed and sworn to before me this 28th day of March, 1923.

[Seal]

OLIVE DIBBLE,

Notary Public in and for the City and County of  
San Francisco, State of California.

Service of the within application for lien admitted this 29th day of March, 1923.

JOHN T. WILLIAMS,

E. L.

Attorney for United States.

[Endorsed]: Filed Mar. 29, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

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In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

**Notice of Hearing of Application for Allowance  
of Lien.**

To the UNITED STATES DISTRICT ATTORNEY, the SPECIAL ASSISTANT to the UNITED STATES DISTRICT ATTORNEY, and to the UNITED STATES MARSHAL:

You will please take notice that the application of H. O. Harrison Co. for the allowance of a lien in its favor upon the Essex touring car seized and ordered sold in the above-entitled proceedings will be placed upon the calendar for hearing in the above-entitled court on Monday, April 2d, 1923, at ten o'clock A. M. or as soon thereafter as the matter can be heard.

Dated March 29th, 1923.

REDMAN & ALEXANDER,  
Attorneys for Applicant.

Service of the within notice admitted this 29th day of March, 1923.

JOHN T. WILLIAMS,  
E. L.  
Attorney for U. S.

[Endorsed]: Filed Mar. 29, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]



In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 12,871.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DANIEL BELLI,

Defendant.

No. 12,188.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GUISEPPE CAPACIOLI,

Defendant.

No. 12,296.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

E. O. KILDALL, et al.,

Defendants.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

**Order Denying Motion. .**

PARTRIDGE, JOHN S.— [12] In each of the above-entitled causes the defendants duly pleaded guilty and were punished for the illegal transportation of liquors contrary to the provisions of the National Prohibition Statute. In each case the liquor was found in an automobile and the automobile was seized and confiscated by the Government. The defendant in each case was in possession of the automobile by virtue of a contract of sale by which the title to the automobile was retained by the vendor, said title not to pass to the defendant until the payment of certain specified sums of money. All of these contracts were in the form of conditional sales, long recognized under the law of California.

In the first three causes the matters are before the Court on petitions for return of the automobile by the vendor. In the last cause, however, the vendor does not ask for the return of the automobile, but applies for an order establishing a lien upon the proceeds of the sale, to the extent of the balance of the unpaid purchase price.

Section 26 of the National Prohibition law provides: "Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer, he shall take possession of the vehicle and team, or automobile . . . and shall arrest any person in charge thereof. The Courts upon conviction of the person so arrested, shall order the liquor destroyed and, unless good cause to the con-

trary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale . . . shall pay all liens according to the priority which are established as being *bona fide* and as having been created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of the liquor.” [13]

It is not by any means easy to reconcile the decisions upon Section 26 of the Act. Judge Thomas, District Judge of the District of Connecticut in *United States vs. Silvester*, 273 Fed. 253, allowed a lien for the amount of the unpaid purchase price under what the opinion calls “a conditional bill of sale,” although he denied the return of the automobile. The opinion seems to treat the unpaid purchase price as a lien upon the property. He denied the petition for the return of the automobile, however, upon the theory that that would permit “a lienor or mortgagor to profit by the transaction and that result was never intended by the framers of the law.”

Quite recently Judge Dooling of this District, sitting in the District of Arizona, in the *United States vs. Marshal Montgomery, et al.*, held distinctly and emphatically that the vendor under a conditional bill of sale has no lien upon the automobile. He gives this as his reason: “It is not unreasonable to suppose Congress had in mind the fact that an owner may determine who shall have the use of the vehicle and thus, in a measure, control

such use, while a lienor may not, because he is at no time entitled to its possession."

It seems to me that this is clearly the proper rule to apply in a case arising under a contract of conditional sale made and to be performed in the State of California. It is perfectly well settled in this state that under one of these conditional contracts for the sale of personal property, the title remains in the vendor and if the property is destroyed, the loss falls upon him. *Potts Company vs. Benedict*, 156 Cal. 322; *Waltz vs. Silveria*, 25 Cal. App. 717. It is equally well settled that the vendor has his option of either of two remedies upon the failure of the vendee to pay the balance of the purchase price; [14]

First, he can take back the property because the title is still in him;

Second, he can waive his right, treat the sale as absolute, and sue for the balance; but he cannot do both. *Park & Lacey Company vs. White River Lumber Company*, 101 Cal. 37; *Holt Manufacturing Company vs. Ewing*, 109 Cal. 353; *Waltz vs. Silveria*, *supra*; *Muncy vs. Brain*, 158 Cal. 300; *Adams vs. Anthony*, 178 Cal. 158.

Reference was made on the argument and the submission of authorities to the recent case of *McDowell vs. United States*, No. 3865, decided by the Circuit Court of Appeals for this Circuit on February 5th. In that case, however, the real question involved was whether Section 3450 of the Revised Statutes had been repealed by the provisions of the National Prohibition Act. It



was clearly recognized that under Section 3450, the conveyance in which goods were moved in an attempt to defraud the United States of a tax was absolutely forfeited, whether or not the person so conveying the goods was the actual owner of the vehicle or not. In that case the Court says that this provision of the Revised Statutes was in effect repealed by Section 26 of the National Prohibition Act. It is therefore apparent that unless language is found in Section 26 which would relieve the vendor under a conditional bill of sale from the provision of forfeiture and sale, that those latter provisions would authorize the Government to seize and sell the conveying vehicle. As Judge Dooling points out in his decision, no such language is found.

It is clear to me, therefore, that at least in California, the following conclusions are inevitable. [15]

1. The vendor under a conditional bill of sale retaining title to the property in himself cannot compel the return of the property by the Government;

2. Such a vendor has no lien upon such a vehicle for the very simple reason that he is the owner thereof.

The motions, therefore, in each case will be denied.

Dated: April 14, 1923.

[Endorsed]: Filed Apr. 14, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[16]

In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant,

and

H. O. HARRISON CO., a Corporation,

Applicant.

**Petition for Writ of Error.**

To the Honorable JOHN S. PARTRIDGE, Judge  
of the United States District Court:

The above-named applicant feeling aggrieved  
by the order made and entered in the above-en-  
titled cause on the 14th day of April, A. D. 1923,  
does hereby apply for a writ of error from said or-  
der to the Circuit Court of Appeals for the Ninth  
Circuit, for the reason set forth in the assignment  
of errors filed herewith, and it prays that a writ of  
error be allowed and that citation be issued as pro-  
vided by law and that a transcript of the record,  
proceedings and document upon which said decree  
was based, duly authenticated, be sent to the  
United States Circuit Court of Appeals for the  
Ninth Circuit under the rules of court in such cases  
made and provided.

And your petitioner further prays that the proper order relating to the required security to be required of it be made.

H. O. HARRISON CO.,

Petitioner.

By REDMAN & ALEXANDER,

Attorneys for Petitioner. [17]

Writ of error allowed upon giving bond as required by law for the sum of \$500.00.

JOHN S. PARTRIDGE,

Judge of the United States District Court.

Service of the within petition for writ of error admitted this 3d day of May, 1923.

J. T. WILLIAMS, U. S. Attorney,

Attorney for Plaintiff, United States of America.

[Endorsed]: Filed May 3, 1923. Walter B. Mal-  
ing, Clerk. By C. W. Calbreath, Deputy Clerk.  
[18]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant,

and

H. O. HARRISON CO., a Corporation,

Applicant.

**Assignment of Errors.**

Now comes the applicant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the writ of error in the above-entitled cause from the decree made by this Honorable Court on the 14th day of April, 1923.

**I.**

That the United States District Court for the Northern District of California erred in denying the application for allowance of a lien filed by the applicant in the above cause.

**II.**

That the United States District Court for the Northern District of California erred in refusing to grant the application of the applicant for the allowance of a lien in its favor upon the Essex automobile ordered sold in the above-entitled cause, for the reason that said applicant had a valid and existing claim against said automobile and that it had no way of securing payment of said claim except by taking said [19] automobile.

WHEREFORE, applicant prays that said order be reversed and that an order be entered reversing the decision of the lower court in said cause and allowing a lien in favor of applicant as prayed in its application.

REDMAN & ALEXANDER,  
Attorneys for Applicant.



Service of the within assignment of errors admitted this 3d day of May, 1923.

J. T. WILLIAMS, U. S. Atty.,

Attorney for Pltff. United States of America.

[Endorsed]: Filed May 3, 1923. Walter B. Mal-  
ing, Clerk. By C. W. Calbreath, Deputy Clerk.  
[20]

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The premium charged for this bond is 10.00  
Dollars per annum.

In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant,

and

H. O. HARRISON CO., a Corporation,

Applicant.

**Bond on Writ of Error.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, the H. O. Harrison Co., a corporation, as  
principal, and The Aetna Casualty and Surety  
Company, as surety, are held and firmly bound  
unto the plaintiff, the United States of America,  
in the above-entitled action in the full and just

sum of Five Hundred Dollars (\$500.00), to which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our, and each of our, successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated this 8th day of May, A. D. 1923.

WHEREAS, lately at a District Court of the United States for the Northern District of California in a proceeding pending in said court, entitled as above, an order and judgment was rendered against said applicant H. O. Harrison Co., a corporation, and the said applicant has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit to reverse the said order and judgment; [21]

NOW, THEREFORE, the condition of this obligation is such, that if the said H. O. Harrison Co., a corporation, shall prosecute such writ of error to effect, and answer the damages and costs if it shall fail to make its plea good, then the above application to be void; otherwise, to remain in full force and virtue.

[Seal]

H. O. HARRISON CO.

By A. S. KING,

Its Secretary.

THE AETNA CASUALTY AND  
SURETY COMPANY.

By H. C. WOOD,

Resident Vice-President.

Attest:

[Seal]

P. M. CHRISTIANSON,

Resident Assistant Secretary.

Approved this 18th day of May, 1923.

JOHN S. PARTRIDGE,

District Judge.

[Endorsed]: Filed May 18, 1923. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.  
[22]

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In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant,

and

H. O. HARRISON CO., a Corporation,

Applicant.

**Bill of Exceptions.**

BE IT REMEMBERED that on February 15, 1923, the plaintiff by John T. Williams, United States Attorney for the Northern District of California by leave of Court filed a verified information in two counts against one Jack Modesti, and that the following is a true copy of said information and of the affidavit in support thereof:

“In the Southern Division of the United States District Court, for the Northern District of California, First Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

### INFORMATION.

At the November term of said Court in the year of our Lord one thousand nine hundred and twenty-two;

BE IT REMEMBERED that John T. Williams, United States Attorney for the Northern District of California, by and through Kenneth M. Green, Special Assistant United States Attorney, who for the United States in its behalf prosecutes in his own proper person, comes into Court on this, the 14th day of February, 1922, and with leave of the said Court first having been had and obtained, gives the Court to understand and be informed as follows, to wit: [23]

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;



NOW, THEREFORE, your informant presents: That Jack Modesti hereinafter called the defendant, heretofore, to wit, on or about the 14th day of December, 1922, in the City and County of San Francisco, in the Southern Division of the Northern District of California and within the jurisdiction of this Court, then and there being, did then and there transport certain intoxicating liquor, to wit: 2 5-gal. bottles of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the transporting of said intoxicating liquor by the said defendant at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: That Jack Modesti, hereinafter called the defendant, heretofore, to wit, on or about the 14th day of December, 1922, in the City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor to wit: 2 5-gal. bottles of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST THE PEACE AND dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,

United States Attorney.

KENNETH M. GREEN,

Special Assistant United States Attorney. [24]

United States of America,

Northern District of California,

City and County of San Francisco,—ss.

George Neavy being first duly sworn deposes and says: That Jack Modesti on or about the 14th

day of December, 1922, at City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and *there on* the premises aforesaid certain intoxicating liquor, to wit: 2 5-gal. bottles of what is called jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the transporting of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 21 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid further deposes and says: That Jack Modesti on or about the 14th day of December, 1922, at City and County of San Francisco, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess certain intoxicating liquor, to wit, 2 5-gal. bottles of what is called jackass brandy then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

GEORGE NEAVY.

Subscribed and sworn to before me this 13 day of February, 1923.

[Seal]

C. M. TAYLOR,  
Deputy Clerk, U. S. District Court, Northern Dis-  
trict of California.

Filed: Feb. 15, 1923. W. B. Maling, Clerk. By  
Lyle S. Morris, Deputy Clerk.”

That on March 17, 1923, the said defendant Jack Modesti upon being arraigned on the said information pleaded guilty to both counts thereof; that thereupon the Court upon the said plea of guilty sentenced the said defendant Jack Modesti to pay a fine of \$400.00, and provided that in the event the said fine was not paid he be imprisoned in the County Jail of the City and County of San Francisco for a period of four months; that on March 21, 1923, in the said proceeding the said Court duly made and entered its order for the sale of one certain Essex touring car; that a true copy of the said order is as follows:

“In the Southern Division of the United States  
District Court, for the Northern District of  
California, First Division.

No. 12,957.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant. [25]



ORDER OF SALE OF PROPERTY SEIZED.

It appearing to the satisfaction of the Court that the above-entitled defendant was on the 17th day of March, 1923, convicted of illegally transporting intoxicating liquor in a certain automobile hereinbefore described, which said automobile was, at the time of the arrest of said defendant, seized by and still is in the possession of the Federal Prohibition Director for the State of California, and no good cause to the contrary being shown by the owner of said automobile;

IT IS HEREBY ORDERED that said automobile, to wit, an Essex Touring Car, License No. 604,483, be sold at public auction by the United States Marshal for the Northern District of California, at the United States Post Office Building, 7th and Stevenson Streets, City and County of San Francisco;

IT IS FURTHER ORDERED that the said Marshal, after deducting the expenses of keeping the said automobile, fee for seizure and the cost of the sale, shall pay all liens, according to their priorities, which are established as being *bona fide* and as having been created without the lienor having any notice that the said automobile was being used or was to be used for the illegal transportation of liquor at the time of the seizure thereof, and shall pay the balance of the proceeds into

the Treasury of the United States as miscellaneous receipts.

R. S. BEAN,

United States District Judge.

Dated: March 22, 1923.

[Endorsed]: Filed Mar. 22, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk."

BE IT FURTHER REMEMBERED that on the 29th day of March, 1923, H. O. Harrison Co., applicant above named, filed in the above-entitled proceeding its verified application for the allowance of a lien in its favor upon the proceeds of the sale of the Essex automobile, which said Essex automobile was seized by the United States Government and ordered sold in the said proceeding, being in words and figures following, to wit:

"In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 12,957.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JACK MODESTI,

Defendant.

APPLICATION FOR ALLOWANCE OF LIEN  
UPON SEIZED PROPERTY. [26]

Comes now H. O. Harrison Co. and in support of this application for a lien against the Essex automobile seized by the United States Government in connection with the arrest of the above-named defendant or against the proceeds of the sale of said automobile, alleges as follows:

1. That applicant is and at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of California and engaged therein in the business of selling automobiles.

2. That on or about the 14th day of April, 1922, applicant sold an Essex touring automobile, 1922 model, Factory No. 611287, Motor No. 71226, to Jack Modesti, defendant above named, under a conditional sales contract under the terms of which title was retained by applicant until the purchase price was fully paid. That before the completion of the payments by said Modesti provided in said contract and while said contract was in full force and effect and on or about the 14th day of December, 1922, said Modesti was arrested charged with the transportation of intoxicating liquor in violation of the Federal Prohibition Act and said automobile was seized by duly authorized agents of the United States Government. That on or about the 17th day of March, 1923, said defendant Modesti was convicted and fined in the above-entitled court and action.

3. That the unpaid balance due and to become due under said contract from said Modesti to applicant at the time of said seizure is the sum of One Hundred Ninety-eight and 06/100 (\$198.06) Dollars and accruing interest at the rate of 8% from April 14, 1922, the date upon which said payments became due.

4. That applicant had no knowledge or reason to believe that said automobile would be used for transportation purposes in violation of the Federal Prohibition Act and that applicant had no notice that said vehicle was being used or was to be used for illegal transportation of liquor or for any purpose in violation of law.

WHEREFORE, applicant prays for the allowance of a lien in its favor in the sum of One Hundred Ninety-eight and 06/100 (\$198.06) Dollars and accruing interest at the rate of 8% from April 14th, 1922, against the said Essex touring automobile herein described or against the proceeds of the sale of said automobile pursuant to the statute in such cases made and provided.

H. O. HARRISON CO.

By REDMAN & ALEXANDER,

Attorneys for Applicant.

United States of America,

State of California,

City and County of San Francisco,—ss.

A. L. King, being first duly sworn, deposes and says: That he is the auditor of the H. O. Harrison Co., the applicant named in the foregoing ap-



plication and is authorized to verify said application; that he has read said application and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and that as to those matters he believes it to be true.

A. L. KING. [27]

Subscribed and sworn to before me this 28 day of March, 1923.

[Seal]

OLIVER DIBBLE,

Notary Public in and for the City and County of San Francisco, State of California.

BE IT FURTHER REMEMBERED that said application came on regularly to be heard on the 3d day of April, 1923, before the Court without a jury, a jury having been waived by the parties, Kenneth M. Green, Esq., Special Assistant United States Attorney, appearing for the plaintiff, the United States of America, and Messrs. Redman & Alexander, appearing for applicant, H. O. Harrison Co., the Honorable John S. Partridge, United States District Judge for the Northern District of California, presiding;

Whereupon the following proceedings were had and evidence introduced, to wit: the record of the previous proceeding in the said cause including the papers and documents hereinabove set forth were seen, examined and understood by the Court and thereupon the conditional contract of sale referred to in the application of H. O. Harrison Co., was offered and received in evidence being in words and figures following, to wit: [28]

WITNESSETH: That the party of the first part hereby agrees to sell and the party of the second part to buy the following described automobile upon the terms and conditions hereinafter set forth:

MODEL YEAR	TRADE NAME	TYPE OF BODY (IF TRUCK STATE TONNAGE)	MOTOR NUMBER	SERIAL NUMBER	STATE LICENSE NUMBER	NEW OR USED	NUMBER OF CYLINDERS
	Essex	Touring	71226	611287		New	4

And pay therefor in Gold Coin of the United States the total purchase price of **\$1510.20** as follows:

<b>\$ 850.00</b>	upon the signing of this contract, receipt of which is hereby acknowledged, and the balance of
<b>\$ 660.20</b>	as follows:

\$ 66.02	on Jan. 14 1923	\$ 66.02	on May 14 1922	\$ 66.02	on Sept. 14 1922
\$ 66.02	on Feb. 14 1923	\$ 66.02	on June 14 1922	\$ 66.02	on Oct. 14 1922
\$	on Mar. 19	\$ 66.02	on July 14 1922	\$ 66.02	on Nov. 14 1922
\$	on Apr. 19	\$ 66.02	on Aug. 14 1922	\$ 66.02	on Dec. 14 1922

and Dollars on the day of each month thereafter  
for months, and each other sum is as hereinafter mentioned, together with interest on all  
amounts unpaid at the rate of 8 per cent per annum from date until paid. All of said  
payments shall be payable at the office of the party of the first part.

1 The party of the second hereby acknowledges receipt of said automobile, and agrees not to sell, attempt to sell, or otherwise dispose of or hypothecate the said automobile nor take the same out of the State of California, nor permit the same to be removed from the possession of the party of the second part, nor permit the same to be attached or replevined, nor create nor permit to be created any lien or incumbrance against the same for storage, repairs or otherwise, and further agrees to keep said automobile in good repair, and to pay all taxes and assessments levied or assessed against said automobile including any taxes or assessments levied or assessed against the title to this automobile, and according to this contract, said party of the second part shall be deemed to have accepted of said automobile, and the party of the first part shall be deemed to have consented of the party of the first part, and said party of the second part hereby further agrees that the said party of the first part may take possession of said automobile for the purpose of putting the same in repair in case said party of the second part fails to keep it in good repair, but the taking possession thereof for such purpose shall not operate as an election by the party of the first part to terminate this contract, and all bills for repairs done upon and material furnished for said automobile by said party of the first part shall be added to the purchase price of said automobile and shall be payable by said party of the second part on the first day of the next succeeding month after the date said party of the second part takes possession of said automobile, and in addition to said automobile, until all such bills have been paid by said party of the second part, and said party of the second part has fully complied with all other terms of this contract.

2. The party of the second part shall keep said automobile insured in a Company selected by said party of the first part, and in favor of the party of the first part, against fire, theft, wrongful conversion, collision and

for an amount not less than the unpaid balance due on this contract. Said party of the second part shall also pay for the premium for said insurance at the time of the execution of this contract, and also to continue said insurance in force during the life of this contract at his expense. In case of loss under said policy the money paid by the Insurance Company shall be retained by the party of the first part or his assigns, in settlement of said loss, to the extent of the unpaid balance under this contract, and the remainder, if any, paid to the party of the second part. Said party of the second part agrees to save said party of the first part harmless from any and all alleged liabilities, including all costs and Attorney's fees, for all injury or damage to persons or property caused in any manner by the maintenance, operation or use of said automobile.

3. Should any loss, damage or injury result to the said automobile from any cause whatever, such loss, damage or injury shall not relieve the purchaser of the second party of his obligation to pay the full balance due according to the terms of this contract, and in case of any unusual or unreasonable depreciation in the value of said automobile, of which the party of the first part shall be the sole judge, and party of the second part may, at its option, retake possession of the said automobile, and sell the same at public auction or at private sale without notice and credit said party of the second part with the proceeds realized from said sale, less deducting the cost of retaking said automobile, together with the cost of the necessary repairs to put said automobile in condition to be sold, and also the costs of said sale, including reasonable commission for making said sale and also reasonable Attorney fees, and shall also credit said party of the second part with all amounts thereupon paid by him under the terms of this agreement, whereupon said party of the second part shall immediately become liable for the balance of the said contract price over and above the amount so paid, and the said party of the first part shall be deemed to have released the second party from the said total contract price agreed upon herein, and the said party of the first part may bring suit for said balance immediately after ascertaining same.

4. Should the party of the second part make default in the payment of any of the said several amounts when due, or in the event of failure of the party of the second part to perform any of the conditions and covenants herein contained, or in the event that the party of the second part shall become financially insolvent or insolvent, or in the event that the party of the second part shall fail to pay the cost of said insurance on demand all payments herein provided for shall be due and payable at once, or the party of the first part may immediately take possession of said automobile whenever and wherever found, or seized, or willfully or negligently used in violation of law, and all such actions taken by the party of the first part shall be deemed to have been justified and warranted as damages for depreciation in value and for the use of said automobile; and the party of the second part hereby waives and relinquishes all claims against the company as paid and all rights against the party of the first part, for taking possession of said automobile.

5. The title to the said automobile herein described including parts, accessories and extra equipment, now or hereafter distributed or made to become  
 one with said automobile shall remain solely in the party of the first part until all of the said payments are made and all the conditions herein set forth are fully complied with. Possession of said automobile shall give the party of the second part no title or interest therein and no  
 10000

[illegible]

2. In case the party of the first part shall employ an Attorney to recover either the automobile or collect any unpaid balance due under this contract, the costs of the second part promise to pay, and there shall immediately become due and payable an additional sum of one thousand dollars (\$1,000.00) to the Attorney. The party of the second part further agrees to pay to the party of the first part any expense which the party of the first part shall incur in the possession of the said automobile, or collecting any balance due under this contract in the event that the party of the second part fails to comply with the promises herein to be performed by the party of the second part.

\_\_\_\_\_ parts of the second part hereby expressly agrees that he will not use or permit said automobile to be used for hire during the existence of the lease, without the written consent of the first part.

1. It is further agreed that the party of the second part will notify the party of the first part of any change of his address.

50. The party of the second part agrees forthwith to properly register said automobile and procure a license therefor from the Motor Vehicle Department of the State of California, and to immediately report the number, in writing, to the party of the first part, or its assigns, who shall have the right to insert the State license number in the blank above provided therefor.

11. This is a summary recap of the essence of this contract.

[illegible]

10. And going on to the second part of our agency that in the event of emergency or emergency military action, that he retains all rights in any defense matters, on the grounds of his military occupation of getting and in consideration of the status of the emergency, that he waives all defense of every kind and nature whatsoever of such laws as may now or may be hereafter enacted relating thereto.

14. It is agreed that this instrument contains the entire agreement between the contracting parties and that no statements, promises or inducements made by any party hereto, or employee, agent or salesman of either party hereto, which is not contained in this written contract shall be binding or valid; and this contract may not be enlarged, modified, or altered except by endorsement hereon, executed by the party of the first part and the party of the second part

15. It is agreed that the party of the second part will exhibit said automobile and allow inspection thereof at any time upon demand of the party of the first part

16. This agreement shall inure to the benefit of and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties hereto.

17. This contract is executed in duplicate, of which the original is delivered to the party of the first part, and the duplicate is delivered to the party of the second part

IN WITNESS WHEREOF, the said parties have hereunto set their hands and seals this **fourteenth**

day of **April** **122**, at **SAN FRANCISCO, CALIFORNIA.**

**H.O.Harrison Co**

Witness

By

**A.L.King**

Witness

**Secretary**

**R. J. Jansen**

**Gino orno Modesti**

Address of party of the second part

### Please Fill Out this Blank Carefully

Name and Post Office address of second party signing this Lease Contract } Name **G. Modesti**  
Town **S.F.** State **S.F.**  
Street **567 London Street** No.

Business or occupation of second party **Ranch Man**

To whom does second party refer as to his financial and general standing. Give two names or more } **Mrs. Shack Groo.** Address **London St. S.F.**  
Address

For what purpose is automobile to be used. **Business and Pleasure**

Where is automobile usually stored **Private Garage**

Have bank account with

Are you over 21 years of age **Yes** Are you married?

How many children? Name and address of relatives in San Francisco

### For Value Received

I hereby assign all my right, title and interest in and to the within contract and in and to the property therein described and all of the moneys payable thereunder to and hereby guarantee the payment of all moneys due or to become due under the said contract and also the full performance by the second party therein named of all the second party's promises and covenants, and I hereby consent that the time of payment of any of the said installments therein provided may be extended at the request of the second party.

Dated, the day of 1922

Conditional

Contract of Sale

TO

Jack Modesti

567 London St. S.F.

Date April 14th 1922



## For Value Received

I hereby assign all my right, title and interest in and to the within contract and in and to the property therein described and all of the moneys payable thereunder to \_\_\_\_\_ and hereby guarantee the payment of all moneys due or to become due under the said contract and also the full performance by the second party therein named of all the second party's promises and covenants, and I hereby warrant that the time of payment of any of the said installments therein provided may be extended at the request of the second party.

Dated the \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_

# Conditional Contract of Sale

TO

Jack Modesti

567 London St. S. F.

Date April 14th 1922



And further evidence supporting all the allegations of the application of H. O. Harrison Co. for the allowance of a lien in its favor against the proceeds of the sale of said Essex automobile, having been introduced, and no answer to said application having been filed and no evidence to the contrary having been offered or introduced by the plaintiff, United States of America, the application on behalf of H. O. Harrison Co. was ordered submitted by the Court for decision.

That thereafter and on the 14th day of April, 1923, the said application was denied by the Court and an order entered accordingly, to which ruling said applicant duly excepted.

REDMAN & ALEXANDER,  
Attorneys for Applicant.

It is hereby stipulated and agreed that the foregoing bill of exceptions is correctly engrossed and may be allowed.

Dated Jun. 5, 1923.

JOHN T. WILLIAMS,  
U. S. District Attorney.  
F. J. SCHMID. [30]

United States of America,  
Northern District of California,—ss.

I, John S. Partridge, Judge of the United States District Court for the Northern District of California, do hereby certify that the foregoing is a full, true and correct bill of exceptions in the above action and that the recitals therein regarding the evidence are true and correct and the same is

now allowed, approved and signed, and ordered filed and made a part of the records in this cause.

Dated: this 16th day of June, 1923.

JOHN S. PARTRIDGE,

Judge.

Received the within bill of exceptions this 14th day of May, 1923, without waiving any objections as to time or otherwise.

JOHN T. WILLIAMS,

U. S. District Attorney.

[Endorsed]: Filed Jun. 13, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.  
[31]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 31 pages, numbered from 1 to 31, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the case of The United States of America, vs. Jack Modesti, No. 12957, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein) and the instructions of the attorney for the appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error

is the sum of Thirteen Dollars and Seventy-five Cents (\$13.75) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the original writ of error (page 33), return to writ of error (page 34) and original citation on writ of error (page 35).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of July, A. D., 1923.

[Seal]

WALTER B. MALING,

Clerk.

By C. M. Taylor,  
Deputy Clerk. [32]

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**Writ of Error (Original).**

United States of America,—ss.

The President of the United States of America,  
to the Honorable, the Judges of the District  
Court of the United States for the Northern  
District of California, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between H. O. Harrison Co., a corporation, applicant and plaintiff in error, and The United States of America, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said H. O. Harrison Co., applicant and plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy

justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and twenty-three.

[Seal]

W. B. MALING,

Clerk of the United States District Court, for the Northern District of California.

By C. M. Taylor,  
Deputy Clerk.

Allowed by:

JOHN S. PARTRIDGE,  
U. S. District Judge. [33]

Due service of the within writ of error and receipt of a copy of same is acknowledged this 23d day of May, 1923.

J. T. WILLIAMS, U. S. Attorney,  
Attorney for Defendant in Error.



[Endorsed]: No. 12957. United States District Court for the Northern District of California. H. O. Harrison Co., a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Writ of Error. Filed May 22, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

**Return to Writ of Error.**

The answer of the Judges of the District Court of the United States, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was, on the 22d day of May, A. D., 1923, duly lodged in the case in this Court for the within named defendant in error.

By the Court.

[Seal].                      WALTER B. MALING,  
Clerk U. S. District Court, Northern District of  
California.

By C. M. Taylor,  
Deputy Clerk. [34]

**Citation on Writ of Error.**

United States of America,—ss.

The President of the United States, to The United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, wherein H. O. Harrison Co., a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PART-  
RIDGE, United States District Judge for the  
Northern District of California, this 18th day of  
May, A. D. 1923.

JOHN S. PARTRIDGE,  
United States District Judge. [35]

Due service of the within citation on writ of error and receipt of a copy of same is acknowledged this 23d day of May, 1923.

J. T. WILLIAMS, U. S. Attorney,  
Attorney for Defendant in Error.

[Endorsed]: No. 12957. United States District Court for the Northern District of California. H. O. Harrison Co., a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Citation on Writ of Error. Filed May 22, 1923. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

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[Endorsed]: No. 4065. United States Circuit Court of Appeals for the Ninth Circuit. H. O. Harrison Company, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filed July 28, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.





5-  
No. 4065

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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H. O. HARRISON Co. (a corporation), <i>Plaintiff in Error,</i> VS. THE UNITED STATES OF AMERICA, <i>Defendant in Error.</i>
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**BRIEF FOR PLAINTIFF IN ERROR.**

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REDMAN & ALEXANDER,  
*Attorneys for Plaintiff in Error.*

FILED  
1. OCT 17 1933  
U.S. DISTRICT COURT  
SAN FRANCISCO



No. 4065

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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H. O. HARRISON Co. (a corporation),  
*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

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## BRIEF FOR PLAINTIFF IN ERROR.

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### Statement of the Case.

On the 14th day of December, 1922, one Modesti was in possession of an Essex touring automobile, 1922 model, license No. 604483, under a valid contract of conditional sale dated April 14, 1922. H. O. Harrison Co., the plaintiff in error, hereinafter called the plaintiff, was the vendor of the automobile in the contract of sale (Tr. pp. 35-36).

On said day while said contract was in force and effect Modesti was arrested in San Francisco and the said automobile was seized by Federal Prohibition agents. On February 15, 1923, an information charging Modesti with the unlawful possession and transportation of intoxicating liquor in violation of the National Prohibition Act was filed by the

United States District Attorney in the United States District Court for the Northern District of California. On March 17, 1923, Modesti was arraigned, pleaded guilty to the charges, was sentenced to pay and did pay a fine of \$400.00. Thereafter on March 21, 1923, the District Court made an order for the sale of said automobile (Tr. p. 7).

At no time did plaintiff herein have any notice or knowledge or reason to believe that the automobile would be or was used for purposes in violation of the National Prohibition Act. At the time it was seized there was a balance on the purchase price of \$198.06 due plaintiff. On March 29, 1923, plaintiff filed a verified application in the proceedings against Modesti praying for the allowance of a lien in that amount in its favor against the automobile or the proceeds of the sale thereof. This application was heard by the court on April 3, 1923, and on April 14, 1923, the court denied the same (Tr. p. 14).

Exception to this ruling was taken and thereafter, in due time, a bill of exceptions was duly settled and filed together with an assignment of errors.

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### **Specifications of Error.**

1. The court erred in refusing to grant the application of plaintiff for the allowance of a lien in its behalf against the seized automobile or against the proceeds of the sale of said automobile for the unpaid balance due it under its contract, for the reason



that it had a valid and existing claim against said automobile as contemplated by Section 26 of the National Prohibition Act.

2. The court erred in denying the application of plaintiff for the allowance of the balance of the purchase price due under its contract out of the proceeds of the sale of the confiscated automobile.

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### Argument.

#### I.

**THE PROVISIONS OF THE NATIONAL PROHIBITION ACT WERE SO FRAMED AS TO PROTECT THE INTERESTS OF INNOCENT PERSONS IN SEIZED PROPERTY FROM FORFEITURE.**

Under several of the internal revenue statutes in existence prior to the enactment of the National Prohibition Act provision was made for the seizure and forfeiture of vehicles used in the transportation of certain commodities. In enforcing these provisions the courts indulged in the fiction that the vehicle itself was the offender and forfeitable irrespective of the guilt or innocence of its owner. Section 3450 U. S. R. S. is an example of such statutes; it provided for the forfeiture of a conveyance used in moving commodities upon which the revenue tax had not been paid. The courts in construing the meaning of the section held in many cases down to and including *Goldsmith v. U. S.*, 254 U. S. 505, that the conveyance was forfeited wholly without regard to the guilt or innocence of the owner or lien

holder. In referring to these old forfeiture statutes the Editor of the Third Edition of Babbitt's "The Law Applied to Motor Vehicles", p. 139, says:

"Like most legal excesses, however, this one bids fair to be short-lived and there is a tendency to be noted, both in the more recent statutes, as in the Volstead Act, and in the decisions, to forfeit interests only of those having guilty knowledge or grounds of suspicion of illegal use."

In framing the provisions of the National Prohibition Act Congress had in mind the drastic and often unjust effects of the confiscatory provisions of these revenue statutes. A reading of Section 26 of said Act discloses that Congress sought to avoid such injustice in dealing with the vehicles seized under this act. The pertinent portions of Section 26 are as follows:

"Sec. 26. \* \* \* Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, \* \* \* and shall arrest any person in charge thereof. \* \* \* the said vehicle or conveyance shall be returned to the owner by execution by him of a good and valid bond, \* \* \* which said bond \* \* \* shall be conditioned to return said property to the custody of said officer on the day of Trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and *unless good cause to the contrary is shown by the owner*, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure, and the cost

of the sale, *shall pay all liens*, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been correct without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property. \* \* \*” (*Italics ours.*)

It must be presumed that Congress in framing this section was not only aware of the injustices worked by the confiscatory provisions of the old customs and revenue acts, but that it also had in mind the fourth amendment of the Federal Constitution which reads:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated \* \* \*.”

And the courts in interpreting the language used by Congress in this section have done so in the light of this amendment and of the principles of construction applicable to such measures. In 25 Corpus Juris 1172 the rule is stated as follows:

“A statute imposing a forfeiture should be construed strictly and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation. The courts will usually give such a construction to statutes providing for for-

feitures as will be consistent with justice and the dictates of natural reason, although contrary to the strict letter of the law.”

See,

*U. S. v. Myers*, 287 Fed. 260;

*U. S. v. One Cadillac Eight Automobile*, 255 Fed. 173, 175;

*U. S. v. Mincey*, 254 Fed. 287, 289 (dissenting opinion).

An exhaustive examination of the cases in which Section 26 has been construed reveals that the courts guided by these principles have afforded to all innocent interested persons the protection clearly intended by Congress. And where the government has endeavored to exact forfeitures under a prior customs or revenue law, the courts have held that the exclusive procedure in the cases involving intoxicating liquor was under the National Prohibition Act, which provides a complete scheme to the exclusion of other statutes and affords protection to innocent interested persons. See

*U. S. v. Brockley*, 266 Fed. 1001;

*The Saxon*, 269 Fed. 639;

*U. S. v. One Haynes Automobile*, 268 Fed. 1003;

*The Goodhope*, 268 Fed. 694;

*U. S. v. Sylvester*, 273 Fed. 253;

*U. S. v. One Hudson Automobile*, 274 Fed. 473;

*U. S. v. One Paige Auto, et al.*, 277 Fed. 524;

*The Coldwater*, 283 Fed. 146.



In *The Saxon*, supra, to avoid injustice to the owner of a seized vessel it was ordered released without bond pending the termination of the criminal proceedings against those in charge of it. In *U. S. v. One Paige Auto, et al.*, supra, the court ordered forfeiture and allowance of a lien under Section 26 of the Prohibition Act although the proceedings of forfeiture were brought under a customs law which did not provide for the allowance of liens in favor of interested persons.

The rights of innocent persons have been regarded by the courts of such importance as to compel the conclusion that the drastic forfeiture provisions of the customs and revenue laws, such as Section 3450 U. S. R. S., so far as they apply to intoxicating liquor, were impliedly repealed by the provisions of the National Prohibition Act. See

*U. S. v. One Hudson Automobile*, 274 Fed. 473;

*U. S. v. One Haynes Auto, et al.*, 268 Fed. 1003;

*U. S. v. One Haynes Automobile*, 274 Fed. 926;

*Lewis v. U. S.*, 280 Fed. 5.

In the case last cited the court said:

"The punishment provided under Section 3450, as it has been construed (*Goldsmith v. U. S.*, 254 U. S. 505, 41 Sup. Ct. 189, 65 L. Ed.), was the confiscation of the automobile wholly without regard to the question whether the owner or lien holder was in any degree at fault; the punishment provided by the National Pro-

hibition Act (Section 26) was a forfeiture of the machine *to the extent only of the interest of those persons who were connected with the offense in some degree of responsibility, guilt or negligence.* \* \* \*

We are not advised of any other supposed distinctions between the question now presented and that which has been decided by the Supreme Court, and our views concerning those which we have now considered make it necessary to hold that Section 3450 is so far repealed that there cannot be a forfeiture thereunder of the means used in transporting or concealing intoxicating liquor manufactured and intended for beverage purposes." (Italics ours.)

And the question was settled in this circuit in the case of *McDowell v. U. S.*, No. 3865, decided February 5, 1923, where this court said:

"Our conclusion is that in so far as it is provided by Section 3450 for the forfeiture of automobiles used to transport liquor upon which the tax has not been paid, the section has been repealed by the provisions of the National Prohibition Act, and that the conclusion of the District Court was erroneous."

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## II.

**A CONDITIONAL VENDOR IS ENTITLED UNDER THE ACT TO THE SAME PROTECTION GIVEN TO OTHER INNOCENT PERSONS HAVING AN INTEREST IN THE VEHICLE SEIZED.**

In this case the plaintiff is the conditional vendor of the automobile seized and ordered sold by the District Court and has asked that its claim for the balance of the purchase price due it under the con-

ditional sale contract be paid to it out of the proceeds of the sale of the automobile. It was conceded that plaintiff was entirely innocent in the premises, that it had no notice or knowledge and no reason to suspect that the automobile sold by it to Modesti would be used by him in violation of the National Prohibition Act.

The view taken by the learned judge of the trial court was that plaintiff was the legal *owner* of the automobile and therefore could have no *lien* upon it; that as such legal owner plaintiff "may determine who shall have the use of a vehicle and thus, in a measure, control such use", and that therefore it should be held responsible for its misuse.

This view, we submit, is not in harmony with the trend of the decisions, nor is it such a construction of the statute as carries out the manifest intent of Congress in enacting it. It is true that the statute does not expressly name conditional vendors, but as it protects the rights of lienors, *a fortiori* it must be assumed that the rights also of innocent vendors are intended to be protected. Under the terms of the contract of *sale* (Tr. p. 35) the vendor has no more control over the use of the automobile than if he had sold it outright and taken a mortgage back to secure the payment of the balance of the purchase price.

It is incredible that Congress intended to protect the rights of a *lienor* and ignore the rights of the *vendor*. It is immaterial that the *legal title* remains

in the vendor. The *equitable ownership* is vested in the vendee, who for all practical purposes is as much the owner as if he had paid the entire purchase price. There is no conceivable rational reason for drawing any distinction between an innocent vendor and an innocent lienor.

Moreover, the statute *expressly provides* that the automobile shall not be confiscated if the "owner" shows "good cause" why it should not be. What *better* showing could be made than was made in this case?

The law of Connecticut relative to conditional sales is similar to that of California. The United States District Court for that state in construing the provisions of Section 26 held, that a conditional vendor is entitled to receive the balance due him on his contract out of the proceeds of the sale of the automobile. See

*U. S. v. Sylvester*, 273 Fed. 253.

In its opinion the court says:

"The intent of the Congress, as disclosed in section 26, here under discussion, is clearly expressed. The conclusions respecting its interpretation are:

First. The seizure, forfeiture, and sale of vehicles is not absolute, as under section 3450 of the Revised Statutes, but is subject to the order of court after it has heard all the facts of each case.

Second. An owner who transports intoxicating liquor illegally forfeits the intoxicating liquor and the vehicle and suffers a penalty.



Third. A conditional vendor or a mortgagee, who allows the vehicle to be used for such unlawful purpose with his knowledge, or who gives his consent to the illicit transportation, shall also forfeit all interest in or his lien upon the vehicle.

*Fourth. A bona fide vendor or mortgagee, without having any notice that the vehicle was being used or was to be used for the illegal transportation of intoxicating liquor, shall be protected to the amount of his bona fide lien, as far as possible.*

Fifth. The owner of a vehicle, who loaned it to another, who, in turn, transported intoxicating liquor therein, is entitled to a return of the vehicle, where he had no knowledge of the purpose of the borrower, and no facts are shown which should have aroused his suspicion.

Sixth. In the second and third instances, the vehicle shall be sold by the United States marshal at public auction, and after all the costs are paid as provided by law, then the balance of the proceeds of the sale shall be turned into the treasury of the United States.

Seventh. In the fourth instance, after the bona fide lien and lack of notice or knowledge have been established, the vehicle shall be sold at public auction. and after the costs, as provided by law, have been paid, the United States marshal shall then pay, if possible, the amount of the bona fide lien in full to the proper person, and the balance, if any, shall be turned into the treasury of the United States." (Italics ours.)

The court held that Congress intended to protect *all innocent interested persons* against unnecessary and unjust penalties and construed the act to embrace vendors as well as lienors.

The provision in the National Prohibition Act preserving the rights of a lienor *implies as a matter of course* that a vendor's rights and interests were to be preserved. There is no reason whatever why Congress should have protected a lienor, such as a mortgagee, and not have protected a conditional sale vendor, who occupies no different position than a mortgagee except that he retains the legal title to the property. So far as the use to which the property may be put by the vendee or mortgagor their positions are identical. The only distinction in their positions is one of procedure. Either may sue for the amount due upon default or breach, or either may repossess the property, in which case the conditional vendor having retained legal title holds the property without further procedure, whereas the mortgagee must foreclose the mortgagor's interest in order to clear the title. *In the matter of control over the property before breach, however, there is no distinction whatever.*

Congress must be deemed to have had this situation in mind in framing the provisions of Section 26. And Congress must also be regarded as having in mind that upon execution of a conditional sale contract the vendor delivers the property into the *possession of the vendee* and preserves only a right to retake it *in the event of a breach by the vendee*. The control over the use of the vehicle lies absolutely in the vendee. Automobiles, of course, could not be sold without the right to the vendee to control the use of the car. The sale makes the vendee an

equitable owner leaving the position of the vendor virtually the same so far as the Prohibition Act is concerned as a mortgagee.

In construing a state prohibition statute containing a forfeiture provision, the Supreme Court of the State of Alabama said:

“But it could not have been the purpose of the Legislature, had it the constitutional right to do so, which we do not decide, to confiscate the property of innocent people or to make vendors and mortgagees of vehicles or other property insurers or guarantors of the conduct of their mortgagors or vendees, notwithstanding they may have exercised ordinary diligence and prudence in making the sale or taking the mortgage, and which would be the result if they are required to keep up with them all the time.”

*Flint v. State*, 85 So. 741 (Ala.).

See, also,

*Bowling v. State*, 85 So. 500 (Ala.);

*Hatcher v. Foster*, 101 S. E. 299 (Ga.);

*Packard v. State*, 86 So. 21 (Ala.).

An important decision, directly in point, by Mr. Justice Rudkin, sitting as a trial judge, was rendered in the cases of

*U. S. v. P. S. Smith and R. V. Tucker*,  
No. 5239, and

*U. S. v. Dick Carlow*, No. 5400.

As we do not find the opinion in these cases reported, we have appended hereto a copy thereof. (See appendix.) It is in entire harmony with the views for which we are contending.

In these cases conditional sale vendors made claim for the return of automobiles seized by Federal Prohibition Agents, it being the contention of the claimants that they were the "owners" of the automobiles and therefore could reclaim them upon a showing that they had no knowledge or reason to believe that the property was used or to be used for illegal purposes in violation of the National Prohibition Act. It should be noted that these cases arose in the district of Washington where the law relative to conditional sales contracts is substantially the same as the law in California. As Justice Rudkin says in his opinion:

"That such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this state (Washington)."

After quoting from two Washington cases supporting his statement, he continues:

"The rule thus stated is not only sound in law, but is controlling upon this court. It must be held, therefore, that the vendor in such a contract is not a mere lienor within the meaning of the law. On the other hand, I am not prepared to hold that such a vendor can reclaim his property absolutely and unconditionally. Before condition broken the purchaser has an interest in the property, and that interest is undoubtedly subject to condemnation and forfeiture. How then may the rights of the conditional vendor be saved without defeating the policy of the law. In my view the way is simple. If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner.



If, on the other hand, in the opinion of the court the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none."

The court held that although the vendor was not technically a lienor he was entitled to a lien upon the proceeds of the sale, but limits his recovery to his interest in the automobile (the unpaid balance of the purchase price), notwithstanding his *technical ownership thereof*, which under a more liberal construction would entitle him to a *return of the automobile itself* upon a showing of innocence.

In other words, the view taken by the learned Justice is that although *technically* the vendor has, under the law after condition broken, the right to make claim to the *whole* car, yet properly construed the act requires that his status be *reduced to that of a mere lienor*. With him it went without saying that Congress intended to protect the interests of the vendor as well as the interests of a lienor.

This, we submit, is the just and sound construction of the statute. The vendor is protected only to the extent of the balance due under the terms of the contract of sale, just as in the case of a sale with

mortgage back securing the unpaid portion of the purchase price. It is elementary and fundamental that a statute should be given a construction "consistent with justice and the dictates of natural reason".

The Government which was established to protect the rights of citizens should not be converted into an instrument for the perpetration upon them of palpable injustice.

For these reasons it is respectfully submitted that the judgment should be reversed.

Dated, San Francisco,

October 10, 1923.

REDMAN & ALEXANDER,

*Attorneys for Plaintiff in Error.*

(APPENDIX FOLLOWS.)

## **Appendix.**





## Appendix

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*In the District Court of the United States  
for the Western District of Washington*

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### NORTHERN DIVISION

United States of America,	Plaintiff,	} No. 5239
vs.		
P. S. Smith and R. V. Tucker,	Defendants.	

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United States of America,	Plaintiff,	} No. 5400
vs.		
Dick Carlow,	Defendant.	

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### MEMORANDUM.

United States Attorney, for Plaintiff.

George L. Spirk, for Claimants and Interveners.

Rudkin, District Judge. These cases call for a construction of the provisions of the National Prohibition Act relating to the seizure and forfeiture of vehicles used in the illegal transportation of intoxicating liquors. The claimants and interveners are vendors in conditional sale contracts, the transportation was by the purchasers, and the vendors had no knowledge or reason to believe that the property was being used for an illegal purpose.

Section 26 of the act provides, among other things, as follows :

“Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the vehicle and team or automobile, boat, air or water craft, or any other conveyance, and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; but the said vehicle or conveyance shall be returned to the owner upon execution by him of a good and valid bond, with sufficient sureties, in a sum double the value of the property, which said bond shall be approved by said officer and shall be conditioned to return said property to the custody of said officer on the day of trial to abide the judgment of the court. The court upon conviction of the person so arrested shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the property seized, and the officer making the sale, after deducting the expenses of keeping the property, the fee for the seizure and the cost of the sale shall pay all liens, according to their priorities, which are established, by intervention or otherwise at said hearing or in other proceeding brought for said purpose, as being bona fide and as having been created without the lien or having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts. All liens against property sold under the provisions of this section shall be transferred from the property to the proceeds of the sale of the property.”

It will be observed that the rights of two classes are thus saved and protected from the forfeiture; first, the owner, who shows good cause to the contrary; and second, bona fide liens "created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor". This section does not undertake to define what will constitute good cause to the contrary, but by referring back to Section 21 of the act it at once becomes manifest that the owner must show merely that he had no knowledge or reason to believe that the property was used or to be used for the illegal transportation of intoxicating liquor. Again, the innocent owner may reclaim his property and avoid a sale, while a mere lien is simply transferred from the property to the proceeds of the sale, and the liens are paid out of such proceeds according to priorities, after deducting the expenses of keeping the property, the fee for the seizure, and the cost of the sale.

What then is the status of the vendor in the conditional contract of sale. The claimants and interveners claim that he is the owner and may reclaim his property, while the Government claims that he is a mere lienor and must resort to the proceeds of the sale for the satisfaction of his claim. That such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this state. Thus, in *Winton Motor Car Co. v. Broadway Auto Co.*, 65 Wash. 650, 654, the Court said:

“The title, which is by this contract reserved in the seller, is the absolute title, under which he may retake the property, if at all, and retain it without an obligation whatever to account therefor, or for any surplus of the value thereof above the unpaid purchase price, to the purchaser. The thing which our law recognizes as being retained by the seller under this contract is not a mere lien or equity securing the balance of the purchase price, but the absolute title, which remains in him or passes from him to the purchaser absolutely, accordingly as the conditions of the sale are broken, or as they are fulfilled, or as may result from some act of election on the part of the seller.”

The court then quoted with approval from *Crompton v. Beach*, 62 Conn. 25, and *Alden v. Dyer & Bro.*, 92 Minn. 134, as follows:

“A contract of conditional sale imposes no lien upon property in favor of the vendor, for that or any other purpose. He does not sell, and receive back a pledge. He retains the title until he elects to part with it, and when he does so elect, the title passes from him; but nothing else thereby springs up in its place in the nature of a lien or incumbrance upon the property, inuring to his benefit. \* \* \* It must now be regarded as the settled law of this state, as well as in most others, that where personal property is sold and delivered with an agreement that the title thereto shall remain in the vendor until the payment of the purchase price, it is a conditional sale, and the transaction cannot be held a mortgage; and it is equally as well settled that, upon the vendee's failure to comply with the condition as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the



price, but the assertion of either right is an abandonment or waiver of the other.”

The rule thus stated is not only sound in law, but is controlling upon this court. It must be held, therefore, that the vendor in such a contract is not a mere lienor within the meaning of the law. On the other hand, I am not prepared to hold that such a vendor can reclaim his property absolutely and unconditionally. Before condition broken the purchaser has an interest in the property, and that interest is undoubtedly subject to condemnation and forfeiture. How then may the rights of the conditional vendor be saved without defeating the policy of the law. In my view the way is simple. If in the opinion of the court the property will not sell for enough at forced sale to satisfy the claim of the vendor, no sale should be ordered, and the property should be restored absolutely and unconditionally to the owner. If, on the other hand, in the opinion of the court the property will bring more than the claim of the vendor, it should be ordered sold, but upon condition that no sale should be made for less than the amount of the unpaid purchase price. If a bid for more than that amount is not forthcoming the property should be restored to the owner; if a larger amount is bid the property should be sold and the owner paid the full amount of his claim out of the purchase price without deductions of any kind. This procedure will protect the rights of all concerned and impair the rights of none.

In the first case, where the property was used for an illegal purpose by a mere bailee without the knowledge or consent of either the vendor in the conditional contract of sale or the purchaser, the property must of course be restored to the owner. In the other case a decree will be entered in accordance with the facts as they may be shown to exist.

No. 4065

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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H. O. HARRISON COMPANY, A Corporation,

*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,

*Defendant in Error.*

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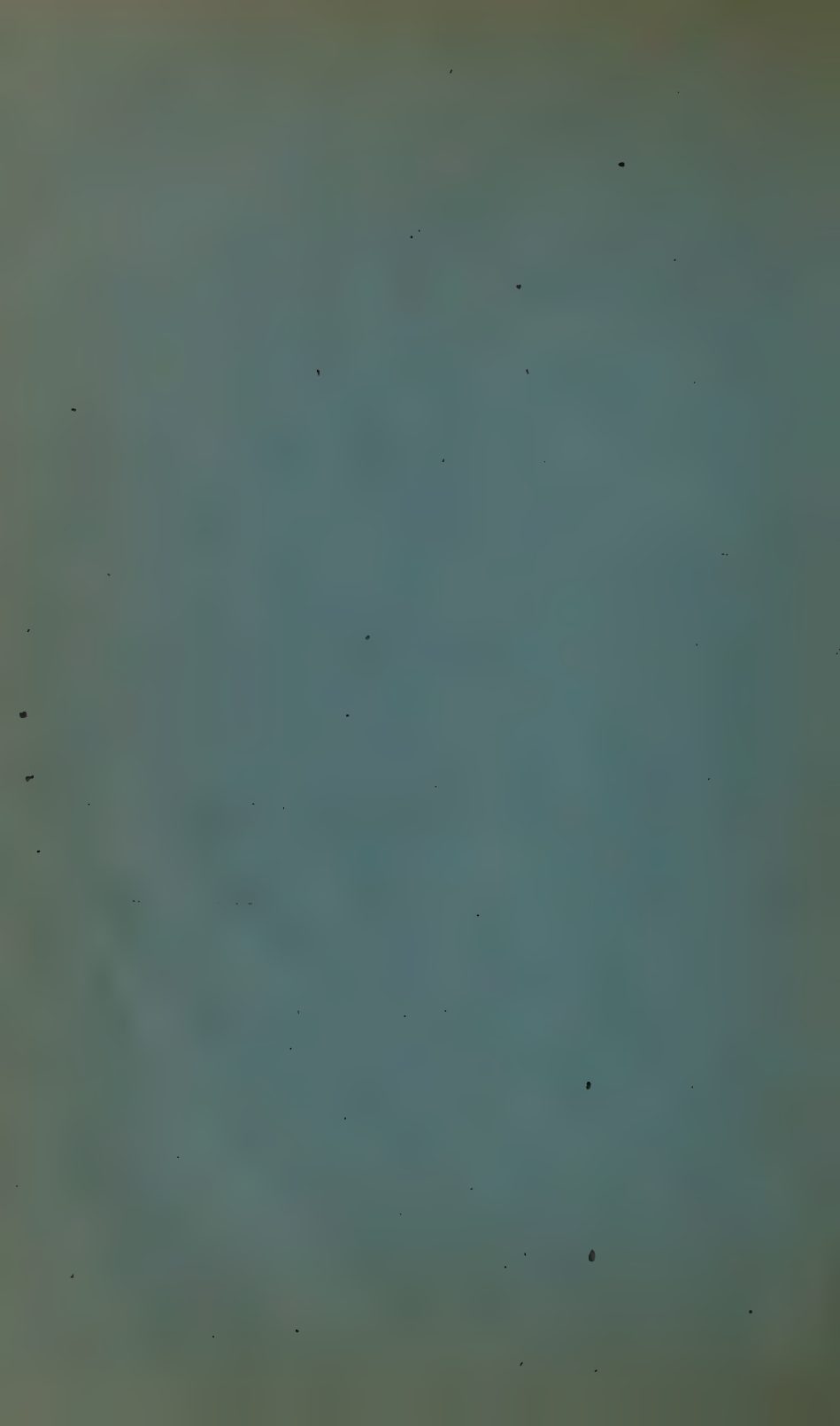
## BRIEF FOR DEFENDANT IN ERROR

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JOHN T. WILLIAMS,  
*United States Attorney.*

T. J. SHERIDAN,  
*Assistant United States Attorney.*  
*Attorneys for Defendant in Error.*





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## BRIEF FOR DEFENDANT IN ERROR

### STATEMENT OF THE CASE.

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This is a writ of error to the United States District Court for the Northern District of California to reverse an order of that court made in a criminal case refusing to grant to petitioner its application for a lien upon the proceeds of the sale of an automobile.

The record consists substantially of a bill of exceptions from which it appears, among other things,

that heretofore one Jack Modesti was informed against for unlawfully transporting intoxicating liquors; that he pleaded guilty on March 17, 1923, and was sentenced to pay a fine of \$400.00 with an alternative; that on March 21, 1923, in the same proceeding the court duly made and entered its order for the sale of the automobile, the said order of sale, omitting titles, being as follows:

“It appearing to the satisfaction of the Court that the above-entitled defendant was on the 17th day of March, 1923, convicted of illegally transporting intoxicating liquor in a certain automobile hereinbefore described, which said automobile was, at the time of the arrest of said defendant, seized by and still is in the possession of the Federal Prohibition Director for the State of California, and no good cause to the contrary being shown by the owner of said automobile;

IT IS HEREBY ORDERED that said automobile, to wit, an Essex Touring Car, License No. 604,483, be sold at public auction by the United States Marshal for the Northern District of California, at the Post Office Building, 7th and Stevenson Streets, City and County of San Francisco;

IT IS FURTHER ORDERED that the said Marshal, after deducting the expenses of keeping the said automobile, fee for seizure and the cost of the sale, shall pay all liens, according to their priorities, which are established as being *bona fide* and as having been created without the lienor having any notice that the said auto-

mobile was being used or was to be used for the illegal transportation of liquor at the time of the seizure thereof, and shall pay the balance of the proceeds into the Treasury of the United States as miscellaneous receipts.

R. S. BEAN,  
*United States District Judge.*

Dated: March 22, 1923."

On March 29, 1923, the petitioner, H. O. Harrison Company, a corporation, filed in the same proceeding its application for the allowance of a lien in its favor upon the proceeds of the sale of the said automobile. The said application appears at page 31 of the transcript of the record and shows that theretofore on April 14, 1922, applicant had sold to Modesti the said car under a conditional sales contract under the terms of which title was retained by applicant until the purchase price was fully paid; that before the completion of the payments by Modesti, and while the contract was in full force, on December 14, 1922, Modesti was arrested, charged with transportation of intoxicating liquor in violation of the "National Prohibition Act," and the automobile seized by the government; that on March 17, 1923, Modesti was convicted and fined; that the unpaid balance due and to become due under the said contract from Modesti was \$198.06, with interest. The application further showed:

"That applicant had no knowledge or reason to believe that said automobile would be used for transportation purposes in violation of the

Federal Prohibition Act and that applicant had no notice that said vehicle was being used or was to be used for illegal transportation of liquor or for any purpose in violation of law.”

The application was verified by one King, described as the auditor of the company. On April 3, 1923, a hearing was had upon the application at which the court saw and considered the papers and documents previously filed in the case and which are set forth in the bill of exceptions and also the conditional contract of sale referred to in the application. This conditional contract appears at page 34 of the Transcript of Record *in extenso*. It is “an agreement to sell and to buy” and in the form of contract usually known as a “conditional sales contract.” It provided in paragraph 5 thereof:

“The *title* to the said automobile herein described, including parts, accessories and extra equipment, now or hereafter attached to or used in connection with said automobile *shall remain solely in the party of the first part until all of the said payments are made and all of the conditions herein contained are fully complied with.* Possession of said automobile shall give the party of the second part no title or interest therein and no rights except as herein provided.”

Another significant provision of the contract appears as paragraph 2 thereof, respecting insurance against confiscation.

The bill of exceptions recites that further evidence



in support of the allegations of the application was introduced and no evidence to the contrary introduced by the government. On April 14, 1923, the court denied the application. A copy of the court's opinion appears at pages 13 to 17 of the Transcript of Record.

We believe that the solution of the controversy thus placed before this court involves the consideration of the two propositions only:

a. Was petitioner corporation's application limited to a claim against the proceeds of the sale as a *lienor* upon the automobile, and

b. Was it, under its contract, in fact such a *lienor*?

### ARGUMENT.

A. THE APPLICATION OF PLAINTIFF IN ERROR WAS MADE, BASED AND LIMITED SO AS TO CONFINE IT STRICTLY TO A CLAIM OF A "LIENOR" AGAINST THE PROCEEDS OF THE SALE OF AN AUTOMOBILE PROPERLY SOLD.

The petitioner's application was made under Section 26 of Title II of the "National Prohibition Act," *Barnes Federal Code, 1923 Supplement*, Section 8352a. The applicant proceeded in the criminal case as an intervenor in a summary proceeding, and unless it showed a case under that section its application was properly denied. It is manifest both from the phraseology of the application as well as from the showing made that it proceeded under the

particular portion of the said section relating to *liens*. In the opening brief filed here it avowedly bases its right upon such theory. Whatever question may exist as to the meaning of portions of this section, it is quite clear that it contains a different provision regulating the rights of “*owners*” of seized cars from the provision relating to the rights of persons who are merely “*lienors*.” It is clearly provided that upon conviction of the person so arrested the court “unless good cause to the contrary is shown by the owner” shall order a sale by public auction of the property seized. A subsequent clause provides that after the sale the officers shall pay all liens established by intervention or otherwise at said hearing or in any other proceeding brought for said purpose as being *bona fide*, and upon the further condition that it is established that the lien was “created without the lienor having any notice that the carrying vehicle was being used or was to be used for illegal transportation of liquor.”

Manifestly the very terms of the section compel the construction that the respective rights of “*owners*” and of “*lienors*” in a seized car fall into different categories, are regulated by different provisions, and are to be vindicated in different proceedings.

The showing of innocence or of non-participation in crime to be made by a mere lienor is specifically provided. What a *lienor* has to do is measured by the express terms of the statute. He needed only

show that his lien is *bona fide*, and that (referring to a past time) it was *created* without the lienor having any notice, etc. Such a lienor is not required to show that he did not have knowledge that the car was afterwards used for illegal purposes.

On the other hand one who comes in as an *owner* and who thus presumably had some power over the custody of the car, is required to show "good cause to the contrary" in respect of a sale about to be ordered. As Judge Dooling well said in the case of

*U. S. v. Montgomery*, 289 Fed. 125, 126,

"It is to be observed that the court shall order a sale of the car 'unless good cause to the contrary' is 'shown by the owner.' What constitutes such 'good cause' on the part of the owner is nowhere specified, but as to a lienor it is declared sufficient to show that the lien was *bona fide* and created without the lienor having any notice that the vehicle was being used or was to be used in the illegal transportation of liquor. The difference between the provisions applicable to owners and those applicable to lienors is significant. It is not unreasonable to suppose that Congress had in mind the fact that an owners may determine who shall have the use of a vehicle, and thus in a measure control such use, while a lienor may not, because he is at no time entitled to its possession. It seems, therefore, to me that the 'good cause' required to be shown by the owner means something more than the lack of notice of illegal use required on the part of the lienor."

It has been held, for example, that such a showing to be made by the owner must exclude the fact that he has been negligent in permitting the unlawful use.

*U. S. v. One W. W. Shaw Automobile, etc.*,  
272 Fed. 491.

Same case in Circuit Court of Appeals, 6th  
Circuit, as *Pittsburgh Taxicab Co. v. U. S.*,  
281 Fed. 669.

It being provided that the car shall be ordered sold unless good cause is shown to the contrary, the burden is on the claimant to satisfy the court.

*U. S. v. Polowy*, 286 Fed. 297.

It thus appears that the showing to be made by the owner of a seized car is to be made before the order of sale and that the burden upon him to show good cause against such sale is manifestly to be more onerous than in the case of a mere lienor. The rights of such an *owner* are to be tried out when the court is considering the question of ordering the sale. If such order be taken against him improperly or inadvertently, the court has power within the same term to reconsider or vacate its order.

*U. S. v. Brockley*, 206 Fed. 1001.

With such an understanding of the meaning of the section it is clear that, if the rights of plaintiff in error were those of an *owner* and distinguished from those of a *lienor*, it should have made its showing at the time the sale was ordered in the case at



bar. And more than that, it is now conclusively presumed that it did attempt to make such a showing or had no such showing to make, for it is recited in the Bill of Exceptions, Transcript of Record, page 28, "on March 21, 1923, in the said proceeding the said court *duly made and entered its order for the sale of one Essex Touring Car,*" a true copy of the order being set forth, and from the order itself appears the recital "that no good cause to the contrary being shown by the owner of said automobile, etc." Thus it appears that the present applicant either sought to show good cause to the contrary and failed, or realizing that it could not meet the burden resting upon an owner, refrained from attempting such showing, and sought to obtain relief by making the minimum showing required from a lienor.

And it may be of interest to note in passing that it is unlikely that it could have impressed the court in that behalf in view of the provision of its own contract where it required the conditional sale vendee to insure in its favor against "confiscation" of the car (paragraph 2 of contract. See photostat in Transcript of Record). Such provision of its contract manifestly had a purpose. No seizure by any foreign invader was in prospect, so that the petitioner could have had no other purpose than to insure against confiscation of the car for unlawful use, the unlawful use most to be anticipated being the violations of the "National Prohibition Act."

And while such question is not now before the court, we should feel most confident in urging its consideration upon a trial court in any such case where a conditional vendor seeks to have the car returned to him.

It is to be noted that the only order sought to be reviewed here is the order refusing to allow the applicant to participate as a *lienor* in the proceeds of the sale of the car. Plaintiff in error has not taken any steps to review the order directing the sale of the car, and the Bill of Exceptions here does not contain any statement of what transpired when the court made its order, nor show what testimony was given or received, or what showing was made to the court to induce the making of the order, nor could the Bill of Exceptions on the present appeal properly show anything in that connection. We have instead the recital in the Bill of Exceptions that the order in question was *duly made* and entered, and we have a recital in the order itself that no cause to the contrary was shown.

Since the order of sale has become a finality in all respects, it is manifest that no party in interest is to be heard in any subsequent proceeding unless he comes within the express terms of the statute and shows that he is a *lienor* and of the class and character therein protected.

We, therefore, urge that it is established from the phraseology of the application, from the fact that the alleged showing of good faith is of the mini-

mun character required of a lienor, from the statement of the situation appearing from the Bill of Exceptions, as well as from the Opening Brief of the plaintiff in error herein filed, that the application of petitioner is strictly limited to an application as a lienor to participate in the proceeds of the sale of a car properly sold, and that petitioner did not come before the court seeking to vindicate any rights as an owner.

**B. PETITIONER UNDER ITS CONTRACT  
WAS NOT A LIENOR EITHER UPON THE  
CAR OR UPON THE PROCEEDS OF THE  
SALE THEREOF.**

That the vendor in a conditional sales contract is not a lienor is manifest. He reserves title to himself until all of the purchase price had been paid. In the event of non-payment he is not required either to foreclose any lien or mortgage, or to sell the property; he has the option of recapture just as any other owner or person holding the title would have.

As Judge Partridge pointed out in his decision incorporated in the Record, the title remained in the vendor and if the property were destroyed, the loss falls upon him.

The same ruling was made by Judge Dooling in the case of

*U. S. v. Montgomery*, 285 Fed. 125.

in which he declared that a contract of the character of the contract here involved had none of the essential requisites of a chattel mortgage; that it did not create a lien in the vendor with title passing to the purchaser, but that it reserved title absolutely in the vendor, and that in such a case we are not dealing with the ~~lien or assisting~~ <sup>rights</sup> rights accorded him by the particular section, but with an owner who has voluntarily parted with the possession and control of the car.

In the decision of Judge Rudkin in the case of

*U. S. v. Smith & Tucker,*

printed as an appendix to the brief of counsel, it was said of a similar contract "that such an owner or vendor is not a lienor is well settled by the decisions of the Supreme Court of this State." While that was said in reference to the State of Washington, the law of California is not dissimilar.

Some reliance is placed in the case of

*U. S. v. Sylvester*, 273 Fed. 253,

wherein the District Court of Connecticut had occasion to consider the rights of a conditional vendor under the section quoted, 26. The case is not authority, however, against the positions here assumed by us. In that case such proceedings as were had were had previous to the ordering of a sale, and while in the course of the opinion some confusion may be made in the use of the words "lien" or



“claim,” the real question before the court was whether such a conditional vendor *showed good cause* against an order of sale.

It may be true that there is nothing in the nature of his contract that would prevent him in any or all cases from showing such good cause. That question does not arise here. The case of *U. S. v. Sylvester, supra*, does not hold that a conditional vendor having suffered a sale of the car to be ordered, has the right as a *lienor* to participate in the proceeds of the sale upon the minimum showing required by Section 26 to be made by such lienor.

Plaintiff in Error places some reliance upon the rulings in the cases of

*U. S. v. Sylvester*, and

*U. S. v. Smith and Tucker, supra*.

As we have noted, these cases are easily distinguishable from the case here in that in both cases the application was made by conditional sales vendor previous to the order of sale, and in which, as owner, the conditional sales vendor sought to show good cause to the contrary and thus prevent a sale and secure the return of the car to himself. In neither of the cases did the applicant avowedly or in effect proceed as a lienor under the subsequent provision of the statute authorizing a lienor to participate in the proceeds of the sale. In the *Smith and Tucker* case the government made a claim that such a vendor was a lienor with a view to securing for

the government part of the proceeds of the sale. This claim was denied, the court holding that he was not a lienor. It is true that in both cases the court granted the application in part. It was not willing to return the car outright, but deemed it just to award to the conditional sales vendor the amount of its interest. We do not dispute that there may be cases where the ownership of the car is so divided among guilty and innocent persons that the court in its discretion could frame procedure so as to deal justly with the situation. It might have required an appraisement and a payment of the difference to be made to the government by the applicant, or it might have done as it did in the cases cited, direct a sale and the proceeds to be divided accordingly. The mere fact that such a sale would be analogous to the case of a lienor is of no significance. The court's action does not proceed upon the theory that a lienor is establishing his interests in the proceeds of a sale previously had.

While we do not concede that the court should not in its discretion in many cases of sales upon conditional contracts refuse to give any relief to a conditional vendor, nevertheless if the matter is not wholly within the discretion of the lower court, there are many facts of important bearing to be considered by the court to enable it to prevent an abuse. And if in a possible case, a conditional vendor can show an entire and absolute good faith and thus be entitled to have his interest protected, no objection to the court's framing a procedure similar to that

in the Sylvester or Smith and Tucker cases so as to forfeit the equitable interest of the vendee and yet recognize the interest of such innocent vendor is seen. But, as we have above indicated, these questions do not arise here because petitioner apparently advisedly refrained from attempting to show any good cause to the contrary at the time the sale was ordered and ordered, as it must now be conclusively presumed, in a proper case and upon a proper showing.

We, therefore, respectfully urge that no error was made by the court below in denying applicant's motion, and the order should be affirmed.

JOHN T. WILLIAMS,  
*United States Attorney.*

T. J. SHERIDAN,  
*Assistant United States Attorney.*  
*Attorneys for Defendant in Error.*





No. 4065 7

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

---

H. O. HARRISON Co. (a corporation),  
*Plaintiff in Error,*

VS.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

---

REPLY BRIEF FOR PLAINTIFF IN ERROR.

---

REDMAN & ALEXANDER,  
*Attorneys for Plaintiff in Error.*

FILED  
JUN 10 1914  
U. S. DISTRICT COURT  
SAN FRANCISCO



No. 4065

IN THE  
**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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H. O. HARRISON Co. (a corporation),  
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VS.

THE UNITED STATES OF AMERICA,  
*Defendant in Error.*

---

**REPLY BRIEF FOR PLAINTIFF IN ERROR.**

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The trial court held (Trans. p. 17), first, that a vendor under a conditional sale contract is not such an "owner" that he can show "good cause" to prevent the sale of a seized automobile and secure its return; and, second, that such a vendor has no "lien" upon the car and therefore cannot be protected with respect to his unpaid balance out of the proceeds of the sale of the car. In other words, that because a conditional vendor is not mentioned in the statute he cannot qualify as "owner" nor as "lienor" and therefor is without rights although he is an innocent party.

Under such a view a situation might arise where no person interested in the seized automobile could assert his rights under Section 26 of the Prohibition

Act. For example: A sells a car to B under a conditional sales contract. C steals it from B and while using it in violation of the Prohibition Act it is seized by the Government. B cannot show "good cause" to prevent a sale because he is not the "owner"—A is the "owner". But A as such "owner" cannot, under the view taken by the trial court, show "good cause" to prevent a sale and compel a return of the car; nor are A and B entitled to a lien upon the proceeds of the sale because they are not technically "lienors." The result is that although both A and B are innocent interested parties and the wrongdoer has no interest in the car, the Government will nevertheless sell the car and confiscate the proceeds! Of course, Congress did not intend that such a palpable injustice should be perpetrated.

Counsel concedes that the trial court's view works a manifest injustice for at page 14 of his brief he says:

"We do not dispute that there may be cases where the ownership of the car is so divided among guilty and innocent persons that the court in its discretion could frame procedure so as to deal justly with the situation."

Counsel concedes the justice of protecting a conditional vendor but he suggests that it should be accomplished in some way other than by the procedure adopted by plaintiff in error in this case.

We accepted the views of Mr. Justice Rudkin as the sound exposition of the law and in accordance



with the decisions rendered by him in the *Smith* and *Tucker* cases we did not ask for the return of the car as "owner" thereof, our understanding being that as our status was not that of a *full* owner but only a vendor without right to the possession of the car, we could not recover more than the unpaid balance of the purchase price. According to the view expressed by Judge Rudkin, a vendor under a conditional sale contract occupies a different position from that of a statutory "owner", as, for example, one who gives permission to another to use his automobile. The law requires such an "owner" to show good cause why the automobile should not be ordered sold, but under the decisions rendered by Judge Rudkin it matters not what "good cause" might be shown *by a vendor*. In no case would he be permitted to recover the *entire* automobile but he is *reduced to the position of a mere lienor*. It was in deference to the views expressed by Judge Rudkin, which appeared to us to be an equitable and sound construction of the statute that we proceeded in the manner that we did. Technically we were the "owner" but not equitably nor substantially, and this being so, we asked for the application of the rule laid down by Judge Rudkin in his decisions. But if we were entitled to more than we asked for, that is no reason why justice should not be done in this case. If it be true that we were entitled to the *return* of the car, regardless of the fact that we were a mere vendor, assuredly this court will not sustain a decree refus-

ing to award to us *less* than we were justly entitled to. This of course would be a manifest and gross injustice.

The statute provides for a sale of the seized vehicle unless good cause to the contrary is shown by the "owner". If the conditional vendor is the "owner" contemplated by the statute, what "good cause" could he show to prevent a sale if the unpaid balance due him were less than the amount which a sale would realize? Clearly none, according to the decisions rendered by Judge Rudkin. It follows therefore that he should be permitted *after the order of sale*, to show his interest, his lack of knowledge that the vehicle was being used for the illegal transportation of liquor and be permitted to participate in the proceeds of the sale to the extent of his interest in accordance with the true spirit of the statute as interpreted by Judge Rudkin.

It is intimated in the brief of plaintiff in error that the provision in the contract requiring the vendee to protect the vendor by insuring against confiscation indicates that the vendor suspected that the automobile would be used in violation of the National Prohibition Act. This suggestion is without foundation. There is no significance whatever attaching to such clause which is found in all conditional sale contracts, the reason therefor being that vendors are without power or authority to control *the use* of the automobiles by the vendees—the *equitable owners* thereof. The clause merely provides for

protection against a *possible contingency*, not against an event which the vendor anticipates.

Nor was there any showing that this provision of the contract had been complied with by the vendee in this case, the truth being that the vendor waived compliance with it (as is often done) which is established by the fact that the application was made by the vendor in its own behalf and not by nor in the interest of an insurance company.

Dated, San Francisco,  
January 2, 1924.

Respectfully submitted,

REDMAN & ALEXANDER,

*Attorneys for Plaintiff in Error.*



8

In the

**United States Circuit Court  
of Appeals**

**For the Ninth Circuit**

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No. \_\_\_\_\_

BACON & MATHESON FORGE CO., JOHN  
PAUL LUMBER COMPANY, SCHWABACHER  
HARDWARE CO., AXEL OLSEN, CHARLES  
MARTINSEN, WEST SEATTLE BOAT & EN-  
GINE CO., M. H. MARTINSEN, E. L. MARTIN-  
SEN, FRED SKOOG, WALTER TURNQUIST,  
CHRIST CHRISTENSEN, J. A. ENGSTROM, R.  
M. PENDLETON and H. G. McLAUGHLIN CO.,  
Appellants

vs.

UNITED STATES OF AMERICA,  
Appellee.

**TRANSCRIPT UPON APPEAL**

FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION

---

JAMES KIEFER,  
Attorney for Appellants.

HON. THOS. P. REVELLE,  
United States Attorney.  
HON. JOHN A. FRATER,  
Assistant United States Attorney.  
and  
HON. CHAS. P. MORIARTY,  
Assistant United States Attorney.  
Attorneys for Appellee.





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Main 1225  
96 Spring Street  
Seattle

In the  
**United States Circuit Court  
of Appeals**  
**For the Ninth Circuit**

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No. \_\_\_\_\_

BACON & MATHESON FORGE CO., JOHN  
PAUL LUMBER COMPANY, SCHWABACHER  
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GINE CO., M. H. MARTINSEN, E. L. MARTIN-  
SEN, FRED SKOOG, WALTER TURNQUIST,  
CHRIST CHRISTENSEN, J. A. ENGSTROM, R.  
M. PENDLETON and H. G. McLAUGHLIN CO.,  
Appellants

vs.

UNITED STATES OF AMERICA,  
Appellee.

---

**TRANSCRIPT UPON APPEAL**

FROM THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF WASHINGTON,  
NORTHERN DIVISION





**In the District Court of the United States for  
the Western District of Washington, North-  
ern Division.**

No. 283-E

BACON & MATHESON FORGE CO., JOHN  
PAUL LUMBER COMPANY, SCHWABACHER  
HARDWARE CO., AXEL OLSEN, CHARLES  
MARTINSEN, WEST SEATTLE BOAT & EN-  
GINE CO., M. H. MARTINSEN, E. L. MARTIN-  
SEN, FRED SKOOG, WALTER TURNQUIST,  
CHRIST CHRISTENSEN, J. A. ENGSTROM, R.  
M. PENDLETON and H. G. McLAUGHLIN CO.,

Petitioners and Appellants.

vs.

UNITED STATES OF AMERICA,  
Appellee.

JAMES KIEFER,

Attorney for Appellants.

HON. THOS. P. REVELLE,

United States Attorney.

HON. JOHN A. FRATER,

Asst. United States Attorney.

and

HON. CHAS. P. MORIARTY,

Asst. United States Attorney.

Attorneys for Appellee.

All of Seattle, Washington.

December 21, 1921, Petition;

February 14, 1922, Special appearance and Motion  
to Quash and Motion to Dismiss;

April 29, 1922, Memorandum decision motion to quash service denied;  
April 29, 1922, Memorandum decision motion to dismiss granted;  
May 4, 1922, Amended petition;  
May 17, 1922, Motion to dismiss amended petition;  
July 12, 1922, Memorandum decision motion to dismiss amended petition granted;  
July 20, 1922, Petition for re-hearing on motion to dismiss amended petition;  
July 20, 1922, Memorandum decision granting motion for re-hearing;  
November 6, 1922, Motion to dismiss amended petition denied;  
March 5, 1923, Answer;  
July 2, 1923, Agreed Statement of Facts;  
July 6, 1923, Memorandum decision petitioners can not recover;  
July 14, 1923, Judgment of Dismissal with costs;  
July 16, 1923, Petition for Appeal;  
    Order allowing appeal and fixing bond filed;  
    Assignments of Error;  
    Notice of Appeal;  
    Appeal bond approved;  
    Citation issued;  
July 17, 1923, Stipulation as to record.

**United States District Court, Western District  
of Washington, Northern Division.**

No. 283-E

BACON & MATHESON FORGE COMPANY, et al,  
Petitioners.

vs.

UNITED STATES OF AMERICA.

---

**AGREED STATEMENT OF FACTS**

For the purpose of shortening the trial and saving expense of proving undisputed facts, the petitioners and the United States agree that the facts involved herein are as follows:

**I.**

On May 21, 1920, the United States of America sold a public vessel, the sub-chaser No. 293, to George L. Harvey and Joseph Kildall. The terms of the sale were \$25.00 cash and a mortgage for \$14,975.00 Possession of the vessel was delivered to the parties. Thereafter the claims of the petitioners in this action accrued.

## II.

At all times after the beginning of the admiralty proceedings hereinafter mentioned on the 7th day of October, 1920, the petitioners had actual notice of the recording of the mortgage to the United States of America, although the vessel had not been registered or enrolled in accordance with Revised Statutes, Secs. 4192, 4193 and 4194. However, the mortgage document itself had been recorded in the Customs House.

## III.

Thereafter on November 18, 1920, the United States of America, through the Navy Department, because of default and failure to pay \$14,975.00 or any of the installments, took possession of the vessel which had been seized by the United States Marshal under a libel in an admiralty proceeding, to which these petitioners were parties. Shortly after taking possession of the vessel she was returned by the Navy Department to the custody of the Marshal, in whose custody she remained until the payments hereinafter stated were made by the United States about June 30, 1921.

## IV.

The United States District Court in admiralty, upon a hearing of the cause, dismissed the claims of these petitioners, on the ground and for the reason

that they were not maritime liens and not within admiralty jurisdiction. The United States of America then paid the lien claims found due by the United States Court in the admiralty proceeding, and took possession of the vessel.

## V.

George L. Harvey and Joseph Kildall, and their successors in interest, executed to the United States certain documents running to the United States, which are hereunto annexed and made a part of this Statement of Facts and marked "Government's Exhibits A and B."

## VI.

That the petitioners Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., West Seattle Boat & Engine Co., and H. G. McLaughlin Co., are, and each of them is, and each of them was at all the times herein mentioned, a corporation duly created and existing under and by virtue of the laws of the State of Washington, with their principal places of business in the City of Seattle, and have paid all license fees due to the State of Washington to date.

## VII.

That on the 21st day of May, 1920, the United States of America, through the Secretary of the



Navy Department thereunto duly authorized by the President, in the manner provided by law, sold and delivered to George L. Harvey and Joseph Kildall, co-partners as the Seattle Fisheries Association, a certain marine sub-chaser known and designated as Sub-Chaser No. 293, for a cash consideration of twenty-five (\$25.00) dollars and the agreement and promise of the said George L. Harvey and Joseph Kildall, partners as aforesaid, to pay the balance of the purchase money, fourteen thousand nine hundred seventy-five (\$14,975.00) dollars, and a bill of sale for said vessel was executed by the said Secretary of the Navy and delivered to the said parties as well as possession of said vessel.

### VIII.

That a certain paper writing, purporting to be a mortgage on said vessel, was executed by said George L. Harvey and Joseph Kildall, co-partners as the Seattle Fisheries Association, running to the United States, and purporting to mortgage said vessel to the United States to secure the balance of said purchase money, to-wit, fourteen thousand nine hundred seventy-five (\$14,975.00) dollars, and in and by said mortgage it was provided and stipulated that certain percentages of the earning of said vessel in the fishing trade should be paid to the United States on account of said mortgage.

IX.

That at the time of the execution of said paper writing purporting to be a mortgage, said vessel had not been registered or enrolled in accordance with the laws of the United States of America in any Custom House in the United States, and said paper writing purporting to be said mortgage was not verified by the mortgagors as required by the statutes of the State of Washington in such case made and provided, and was never recorded in the office of the Auditor of the County of King, in the State of Washington, in which County said vessel was kept at all times during the reconstruction work upon her hereinafter set out.

X.

That said vessel was not registered under the laws of the United States as a vessel until the 4th day of September, 1920.

XI.

That thereupon the said persons took possession of said vessel and proceeded to reconstruct and alter said vessel from a war vessel to a fishing vessel, and said reconstruction and alteration was contemplated by the terms of said mortgage, it being therein provided and stipulated that certain percentages of the earning of said vessel, in the fishing

trade, when so reconstructed, should be paid to the United States on account of said mortgage.

## XII.

That thereafter the said George L. Harvey and Joseph Kildall procured the organization of a corporation known as Seattle Trawl Fisheries Association, under the laws of the State of Washington, having its place of business in the City of Seattle, and conveyed said vessel, and delivered said vessel, to said Seattle Trawl Fisheries Association, which proceeded with the work, and assumed all liabilities theretofore contracted for said work, and in the course of said reconstruction and alteration employed these petitioners who furnished labor and materials as hereinafter set out.

## XIII.

That between the 11th day of August, 1920, and the 4th day of September, 1920, at the request of the Seattle Trawl Fisheries Association, and its predecessors in interest, the petitioner Bacon & Matheson Forge Co. furnished iron work and similar materials and labor in and about the reconstruction and alteration of said vessel, all of the reasonable value of \$1191.96.



XIV.

That the petitioner John Paul Lumber Company, between the 13th day of July, 1920, and the 10th day of September, 1920, at the request of the said Seattle Trawl Fisheries Association, and its predecessors in interest, furnished lumber for use in the reconstruction and alteration of said vessel, of the reasonable value of \$439.04.

XV.

That the petitioner Schwabacher Hardware Co., at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, between the 2nd day of August, 1920, and the 5th day of October, 1920, furnished hardware and other metal goods for use in the reconstruction and alteration of said vessel, of the reasonable value of \$610.44, and said petitioner received, through the proceedings hereinafter set out, on account thereof, the sum of \$97.22, leaving a balance due said petitioner of \$513. 22 for said materials so furnished.

XVI.

That the petitioner Axel Olsen, a resident of the City of Seattle, Washington, at the request of the said Seattle Trawl Fisheries Association, and its predecessors in interest, in the months of August and September, 1920, performed labor in and about the reconstruction and alteration of said



vessel, and earned therein the sum of \$139.40, and said petitioner has received, through the proceedings hereinafter set out, \$53.40, leaving a balance due said petitioner of \$86.00.

### XVII.

That the petitioner Charles Martinsen, a resident of the City of Seattle, Washington, between the 29th day of July and the 7th day of September, 1920, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, performed labor as a shipwright on board of said vessel in and about the reconstruction and alteration of the same, at the agreed rate of wages of \$10.00 per day, for thirty-one (31) days, and during said period said petitioner also advanced to said Seattle Trawl Fisheries Association, and its predecessors in interest, at their request, the sum of \$50.25, to be used in the payment of materials and labor in said reconstruction, and said Charles Martinsen has been paid on account thereof the sum of \$42.00, through the proceedings hereinafter set out, leaving a balance due said petitioner of \$318.25.

### XVIII.

That the petitioner West Seattle Boat & Engine Co., in the months of August, September and October, 1920, at the request of said Seattle Trawl Fisheries Association, and its predecessors in in-



terest, furnished materials, dry dock service and dockage in the reconstruction and alteration of said vessel of the reasonable value of \$464.00, and said petitioner has received on account thereof, through the proceedings hereinafter set out, the sum of \$65.00, leaving a balance due said petitioner West Seattle Boat & Engine Co. of \$399.56.

XIX.

That the petitioner M. H. Martinsen, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, performed labor as a ship carpenter on the reconstruction and alteration of said vessel, between July 29, 1920, and September 11, 1920, and earned during said period the sum of \$385.11, and advanced, at the request of said Seattle Trawl Fisheries Association, for the payment of material used in said repairs, the sum of \$4.75, making a total of \$389.96 due said petitioner.

XX.

That the petitioner E. L. Martinsen, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, worked as a shipwright on board said vessel in the said reconstruction and alteration thereof, between July 29th, 1920, and September 7, 1920, at the agreed rate of \$10.00

per day, working in all thirty-one (31) days, and advanced for the use of the said Seattle Trawl Fisheries Association, and used by them in the payment of labor and materials used in said reconstruction, the sum of \$26.24, making a total balance of \$336.24 due said petitioner.

### XXI.

That the petitioner Fred Skoog, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, worked upon said vessel as a shipwright in the reconstruction and alteration thereof, between August 15th and September 17th, 1920, working eleven and  $\frac{3}{8}$  (11- $\frac{3}{8}$ ) days, at the agreed rate of \$8.46 per day, and there is now due therefor to the petitioner Fred Skoog the sum of \$95.61.

### XXII.

That the petitioner Walter Turnquist, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, worked as a machinist on board said vessel during the reconstruction and alteration of said vessel, in the months of August and September, 1920, and earned during said period \$19.20.

### XXIII.

That the petitioner Christ Christensen, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, worked on said vessel during the reconstruction and alteration of said vessel on the 8th, 9th, 10th, 11th and 12th days of September, 1920, at the agreed rate of \$1.00 per hour, and including overtime, worked during said period fifty-two (52) hours, and has been paid on account thereof \$12.00, leaving a balance due of \$40.00 to said petitioner.

### XXIV.

That the petitioner J. A. Engstrom, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, between the 7th day of September, 1920, and the 14th day of September, 1920, both inclusive, and between the 20th day of September, 1920, and October 2nd, 1920, worked on said vessel during the reconstruction and alteration thereof as a cook, preparing meals for those engaged in working on said vessel, at the agreed rate of wages of \$6.00 per day, earning during said period \$120.00, and said petitioner has received on account thereof, through the libel proceedings hereinafter set out, the sum of \$84.00, leaving a balance due said petitioner of \$36.00.

XXV.

That the petitioner R. M. Pendleton, a resident of the City of Seattle, Washington, at the request of said Seattle Trawl Fisheries Association, and its predecessors in interest, during the progress of said reconstruction and alteration of said vessel and prior to October 1, 1920, performed work as an engineer and machinist in said reconstruction, earning therefor during said period, after allowing for all payments and credits up to the end of said service, the sum of \$381.75, and since said service was closed said petitioner has received on account the sum of \$74.00, through the libel proceedings hereinafter set out, leaving a balance due said petitioner of \$307.75.

XXVI.

That the petitioner H. G. McLaughlin Co., by agreement with the Seattle Trawl Fisheries Association, and its predecessors in interest, furnished and delivered on board said vessel, in the reconstruction and alteration thereof, an engine hoist and winch, at the agreed price of \$1138.00, of which said petitioner has received the sum of \$500.00, leaving a balance due said petitioner of \$638.00.



## XXVII.

That at about the time of the closing of the rendition of said services hereinbefore set out, the said vessel, which had been renamed the George L. Harvey, was seized by the Marshal of the United States for the Western District of Washington under sundry and divers monitions and attachments, in libel proceedings in rem against said vessel, and in said proceedings all of these petitioners were either libelants or intervening libelants, and said proceedings were consolidated in two causes in this Court as follows:

H. G. McLaughlin Co., et al, libelants, vs. Gas Boat Geo. L. Harvey, her tackle, apparel and furniture etc., respondents, Seattle Trawl Fisheries Association, claimant, being cause No. 5608 of the files of this Court; and

J. A. Engstrom, libelant, vs. American Steamer Geo. L. Harvey, her tackle, apparel and furniture, respondent, Seattle Trawl Fisheries Association, claimant, No. 5613, of the files of this Court;

and it was so proceeded in said consolidated causes that all the proofs of testimony were taken, and when the cause was ready for submission to this Court, the United States of America, by its District Attorney for the Western District of Washington, and by written suggestion and motion filed, suggested to the Court and gave it to understand



and be informed that said causes involved property and property rights of the United States and could not be maintained against the United States, and that the liens of libels were not maritime liens and therefore were not within the jurisdiction of this Court sitting in admiralty, and therefore without submitting the rights of the United States to the jurisdiction of the Court, insisting that the Court had no jurisdiction of the subject matter in controversy, either in law or admiralty, and submitting whether in consideration of the premises the Court would take jurisdiction of said causes, said attorney for the United States moved that said bills of libel be set aside and dismissed, and all proceedings in said suits stayed, and prayed for such other orders as might be proper in the premises, and thereupon such proceedings were had in said causes that further proofs were taken therein by the United States Commissioner, to whom the same were referred, and the Court, after argument of proctors, in which argument the attorneys for the United States made the contentions before said Court in said causes that said vessel Geo. L. Harvey, formerly Sub-Chaser No. 293, was a part and parcel of the naval establishment and forces of the United States and not subject to the admiralty and jurisdiction of this Court, and after due consideration had, it was by this Court adjudged and decreed that the said vessel had been properly sold and overruled the objections and contentions of the

United States, and ordered said vessel condemned and sold by the Marshal, in the manner provided by law, for the payment of certain claims which were by the Court held and adjudged to be maritime claims against said vessel, and among other claims, by the decree of said Court, the claim of the petitioner herein Schwabacher Hardware Co. was allowed in the sum of \$97.22, besides costs; and the claim of petitioner herein Axel Olsen was allowed in the sum of \$53.40 besides costs; and the claim of the petitioner herein Charles Martinsen was allowed in the sum of \$42.00 besides costs; and the claim of the petitioner herein West Seattle Boat & Engine Co. was allowed in the sum of \$65.00 besides costs; and the claim of the petitioner herein J. A. Engstrom was allowed in the sum of \$84.00 besides costs; and the claim of the petitioner herein R. M. Pendleton was allowed in the sum of \$74, and thereafter and on or about the 30th day of June, 1921, the said claims hereinbefore mentioned, together with other claims which had been likewise allowed by said decree, and for the payment of which said vessel had by said decree been condemned and ordered sold, were by the United States paid and satisfied.

## XXVIII.

Thereafter on July 26, 1920, in the Superior Court of Kitsap County, petitioners in the above entitled cause commenced an action, to which John

A. Hoogewerff, then Commandant of the United States Navy Yard at Bremerton, at which Navy Yard in Kitsap County the said vessel then was, was made a party in his individual capacity, and who appeared specially in said cause and established to the Court that he had such vessel in his charge and possession as an officer of the United States Navy, and not otherwise, and said Superior Court thereupon determined that it was without jurisdiction to determine the rights of the petitioners as against said Hoogewerff and dismissed said cause as against said Hoogewerff upon that ground. The United States was not a party to said action.

### XXIX.

That said Superior Court appointed a receiver in said cause to take possession of said vessel, who duly qualified and demanded of said Hoogewerff possession of said vessel, which was refused. No other process of attachment or execution against said vessel, or process looking to the seizure thereof, was issued in said cause by said Superior Court of Kitsap County, or asked for by petitioners.

### XXX.

The said cause in said Superior Court was duly prosecuted to judgment, which judgment was entered on November 18, 1921, and provided that the said vessel should be sold after giving notice

according to law for the payment of the said amounts therein adjudged and decreed to be due, and which amounts, as set forth in the petition of petitioners, are correct. A true copy of said decree of foreclosure is hereto attached, made a part hereof and marked Petitioners' Exhibit 1.

### XXXI.

That the petitioners are all residents of Seattle in said District, or corporations having their offices and places of business therein.

### XXXII.

That the said vessel remained in the United States Navy Yard at Bremerton, in Kitsap County, Washington, until February 2, 1922, when the United States, through its Navy Department, sold the said vessel to M. Chechik, of Vancouver, British Columbia, for the sum of seven thousand (\$7000.-00) dollars, and delivered possession to said Chechik, said sale and delivery being to petitioners unknown for some months thereafter.

### XXXIII.

That the subsequent documentation of said vessel is shown in petitioners' Exhibits 2 and 3, which are hereto annexed and made a part hereof.

IT IS FURTHER STIPULATED between counsel for the petitioners and for the United States, that



this cause, begun December 21, 1921, be submitted to this Court upon the foregoing facts for its judgment and opinion as to the right of the petitioners to recover against the United States, the petitioners and the United States both, respectively, reserving the right to sue out a writ of error or take an appeal, as allowed by law, from or to the appropriate appellate court, as provided by law for the review of such judgment, as in all other cases.

Dated Seattle, Washington, July 2, 1923.

JAMES KIEFER,

Attorney for Petitioners.

THOS. P. REVELLE,

United States Attorney,

CHARLES P. MORIARTY,

Asst. United States Attorney.

United States of America,  
Western District of Washington, } ss.  
County of King,

James Kiefer and Charles P. Moriarty, being sworn according to law, do depose and say: That they are attorney, respectively, for petitioners and for the United States in the above entitled Court; that the controversy set out in the foregoing Agreed Statement of Facts is an actual controversy between the parties to said cause.

JAMES KIEFER,

CHARLES P. MORIARTY,



Subscribed and sworn to before me this 2nd day of July, 1923.

S. E. LEITCH,

Deputy Clerk.

Filed in the United States District Court, Western District of Washington, Northern Division, July 2, 1923.

F. M. Harshberger, Clerk,

By S. E. Leitch, Deputy.

PETITIONERS' EXHIBIT 1.

Customs and Excise, Canada.

Port of Vancouver, B. C.,

10th April, 1923.

James Kiefer,  
Suite 327 Colman Bldg.,  
Seattle, Wash.

Dear Sir:

Sub-chaser 293 (G. L. Harvey).

In answer to your letter dated 10 April, I would say bill of sale shows Meyer Chechik of 808 Board of Trade Building, City of Vancouver, B. C.

This man is traveling at times and was for some time in Winnipeg, Man., and his last com-

munication to me was from his advocates, Barnard & McLeown, 145 St. James Street, Montreal.

Your truly,

G. A. Allen,

Registrar of Shipping.

GEA/SMcS.

283E Pets. Ex. 1.

## PETITIONERS' EXHIBIT 2.

Customs and Excise, Canada.

Port of Vancouver, B. C.,

16th March, 1923.

James Kiefer, Esq.,  
Suite 327 Colman Bldg.,  
Seattle, Wash.

Dear Sir:

Your favor of 15th inst. received and have the honour to inform you that sub-chaser 293 (also known as "George L. Harvey") was sold by the United States Government to M. Chechik, who then transferred it by bill of sale to,—Coal Harbour Wharf & Trading Company Limited, 1701 Georgia Street, West, Vancouver, B. C., which company now appears as the registered owner, being so registered 3rd May, 1922.

This vessel is registered as the "Etta Mack."  
Official No. 150,649.

Trusting that this information will suit your purpose,

Yours,

Geo. E. Adams,

Assistant Registrar of Shipping.

(Customs, Canada, Collectors Office, March 16,  
1923, Vancouver, B. C.)

GEA/SMcS.

283E Petrs. Ex. 2.

Filed November 26, 1921.

-----  
Clerk.

By -----  
Deputy.

**In the Superior Court of Kitsap County, State  
of Washington.**

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BACON & MATHESON FORGE CO., JOHN  
PAUL LUMBER COMPANY, SCHWABACHER  
HARDWARE CO., AXEL OLSEN, CHARLES  
MARTINSEN, WEST SEATTLE BOAT & EN-  
GINE CO., M. H. MARTINSEN, E. L. MARTIN-  
SEN, FRED SKOOG, WALTER TURNQUIST,  
CHRIST CHRISTENSEN, J. A. ENGSTROM, R.  
M. PENDLETON and H. G. McLAUGHLIN CO.,  
Plaintiffs.

vs.

SEATTLE TRAWL FISHERIES ASSOCIATION  
and JOHN A. HOOGEWERFF,  
Defendants.

No. 6020

**DECREE OF FORECLOSURE**

In this cause, the default of the defendant  
Seattle Trawl Fisheries Association having been

duly entered, and the cause coming on to be heard upon the proofs adduced by the plaintiffs; and

It appearing to the Court that the defendant Seattle Trawl Fisheries Association is, and was at all the time mentioned in the complaint herein, a corporation, existing under and by virtue of the laws of the State of Washington, and the owner and in possession of the vessel formerly known as Sub-Chaser No. 293, and latterly known as the Geo. L. Harvey; and that the plaintiffs Bacon & Mathe-son Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., West Seattle Boat & Engine Co., and H. G. McLaughlin Co. are and were at the times mentioned in the complaint herein, corporations duly created and existing under and by virtue of the laws of the State of Washington, and have paid all license fees due to the State of Wash-ington to date; and

It further appearing to the Court that between the 11th day of August, 1920, and the 4th day of September, 1920, at the request of the defendant Seattle Trawl Fisheries Association, the Bacon & Matheson Forge Co. furnished iron work and like materials and labor in and about the refitting and alteration of said vessel of the reasonable value of eleven hundred ninety-one and 96/100 (\$1191.96) dollars, no part of which has been paid; and

That the plaintiff John Paul Lumber Company, between July 13th, 1920, and September 10th, 1920,



at the request of said defendant, furnished lumber for use in the alteration of said vessel, of the reasonable value of four hundred thirty-nine and 4/100 (\$439.04) dollars, no part of which has been paid; and

The the plaintiff Schwabacher Hardware Co., at the request of the said defendant corporation, between August 2nd, 1920, and October 5th, 1920, furnished hardware and other metal goods for use in the refitting and alteration of said vessel of the reasonable value of six hundred ten and 44/100 (\$610.44) dollars on account of which said plaintiff has received the sum of ninety-seven and 22/100 (\$97.22) dollars, leaving a balance due of five hundred thirteen and 22/100 (\$513.22) dollars; and

That the plaintiff Axel Olsen performed labor in and about the reconstruction and alteration of said vessel, at the request of said corporation defendant, in the sum of one hundred thirty-nine and 40/100 (\$139.40) dollars, of which said plaintiff has received the sum of fifty-three and 40/100 dollars, leaving a balance due said plaintiff Olsen of eighty-six (\$86.00) dollars; and

That the plaintiff Charles Martinsen performed labor as a shipwright in the reconstruction and alteration of said vessel, at the request of the said corporation defendant, at the agreed rate of wages of ten (\$10.00) dollars per day, between July 29th

and September 7th, 1920, earning during said time three hundred ten (\$310.00) dollars, and also advanced during said time, for and on account of said vessel, at the request of said corporation defendant, the sum of fifty and 25/100 (\$50.25) dollars, no part of which has been paid except the sum of forty-two (\$42.00) dollars, leaving a balance due to said plaintiff Charles Martinsen of three hundred eighteen 25/100 (\$318.25) dollars; and

That the plaintiff West Seattle Boat & Engine Co., in the months of August, September and October, 1920, at the request of the said corporation defendant, furnished materials, dry dock service and dockage, in the alteration and reconstruction of said vessel, of the reasonable value of four hundred sixty-four and 56/100 (\$464.56) dollars, of which there has been paid the sum of sixty-five (\$65.00) dollars, leaving a balance due to said plaintiff West Seattle Boat & Engine Co. of the sum of three hundred ninety-nine and 56/100 (\$399.56) dollars; and

That the plaintiff M. H. Martinsen, at the request of said corporation defendant, worked as a ship carpenter on the reconstruction and alteration of said vessel, between July 29, 1920, and September 11, 1920, and earned during said period the sum of three hundred eighty-five and 11/100 (\$385.-11) dollars, and advanced at the request of the said corporation defendant the sum of four and 75/100

(\$4.75) dollars used on said vessel in said repairs, making a total of three hundred eighty-nine and 86/100 (\$389.86) dollars, all of which is due said plaintiff M. H. Martinsen; and

That the plaintiff E. L. Martinsen, at the request of the said corporation defendant, worked as a shipwright on board said vessel in the reconstruction and alteration of said vessel between July 29th and September 7th, 1920, at the agreed rate of wages of ten (\$10.00) dollars per day, working in all thirty-one (31) days, and advanced for the use of the owners of said vessel, at their request, the sum of twenty-six and 24/100 (\$26.24) dollars, which was used by them for the payment of materials used on board in said reconstruction and alteration, and the whole amount thereof, three hundred thirty-six and 24/100 (\$336.24) dollars is now due said plaintiff E. L. Martinsen; and

That the plaintiff Fred Skoog, at the request of said corporation defendant, worked on said vessel in the reconstruction and alteration thereof as a shipwright between August 15th and September 17th, 1920, working eleven and three-eighths ( $11\frac{3}{8}$ ) days at the agreed rate of eight and 46/100 (\$8.46) dollars per day, and there is now due therefor to the said plaintiff Fred Skoog the sum of ninety-five and 61/100 (\$95.61) dollars, no part of which has been paid; and

That the plaintiff Walter Turnquist, at the request of said corporation defendant, worked as a machinist during the reconstruction and alteration of said vessel, during the months of August and September, 1920, and earned during that period nineteen and 20/100 (\$19.20) dollars, no part of which has been paid; and

That the plaintiff Christ Christensen worked as a rigger during the reconstruction and alteration of said vessel, at the request of the corporation defendant, on the 8th, 9th, 10th, 11th and 12th days of September, 1920, at the agreed rate of wages of one (\$1.00) dollar per hour, and including overtime worked during said period fifty-two (52) hours, and has been paid on account thereof twelve (\$12.00) dollars, leaving a balance of forty (\$40.-00) dollars now due and owing to said plaintiff Christ Christensen; and

That the plaintiff J. A. Engstrom, between the 7th day of September, 1920, and the 14th day of September, 1920, both inclusive, and between the 20th day of September, 1920, and October 2nd, 1920, at the request of said corporation defendant, worked as a cook on said vessel during the reconstruction and alteration thereof preparing meals for those on board her, and earned during said period the sum of one hundred twenty (\$120.-00) dollars, of which eighty-four (\$84.00) dollars have been paid, leaving a balance due said J. A. Engstrom of thirty-six (\$36.00) dollars; and



That plaintiff R. M. Pendleton, at the request of said corporation defendant, between May 2nd, 1920, and October 1st, 1920, performed work as an engineer and machinist in the reconstruction and alteration of said vessel, earning therefor during said period, after allowing for all credits and payments, the sum of three hundred eighty-one and 75/100 (\$381.75) dollars, and since said service was closed said plaintiff Pendleton has received the further sum of seventy-four (\$74.00) dollars, leaving a balance of three hundred seven and 75/100 (\$307.75) dollars due said plaintiff Pendleton; and

That plaintiff H. G. McLaughlin Co., by agreement with the said corporation defendant, furnished an engine hoist and winch for use in the reconstruction and alteration of said vessel, at the agreed price of eleven hundred thirty-eight (\$1138.00) dollars, five hundred (\$500.00) dollars of which has been paid the said plaintiff, leaving a balance due the plaintiff H. G. McLaughlin Co. of six hundred thirty-eight (\$638.00) dollars; and

It further appearing to the Court that all of the services performed and all material furnished by the respective plaintiffs herein, were necessary for the reconstruction and alteration of said vessel, and were furnished upon the credit of said vessel and while she was in King County, and in the possession of her then owners, the defendant Seattle Trawl Fisheries Association and their predecessors



in interest, and that said vessel has since been removed to Kitsap County, and that the plaintiffs each have, and each assert, a claim or lien for said labor performed and material furnished, in accordance with the statutes of the State of Washington in such case made and provided;

NOW THEREFORE, IT IS BY THE COURT HEREBY ORDERED, CONSIDERED, ADJUDGED AND DECREED, AND THE COURT DOES HEREBY ORDER, CONSIDER, ADJUDGE AND DECREE, that the plaintiffs do have and recover of and from the defendant the Seattle Trawl Fisheries Association the following sums:

The plaintiff Bacon & Matheson Forge Co.	
the sum of-----	\$1191.96
The plaintiff John Paul Lumber Co. the	
sum of -----	439.04
The plaintiff Schwabacher Hardware Co.	
the sum of-----	513.22
The plaintiff Axel Olsen the sum of-----	
	86.00
The plaintiff Charles Martinsen the sum of	
	318.25
The plaintiff West Seattle Boat & Engine	
Co. the sum of-----	399.56
The plaintiff M. H. Martinsen the sum of	
	389.86
The plaintiff E. L. Martinsen the sum of	
	336.24
The plaintiff Fred Skoog the sum of-----	
	95.61
The plaintiff Walter Turnquist the sum of	
	19.20

The plaintiff Christ Christensen the sum of	40.00
The plaintiff J. A. Engstrom the sum of--	36.00
The plaintiff R. M. Pendleton the sum of	307.75
The plaintiff H. G. McLaughlin Co. the sum of -----	638.00

together with interest thereon from December 1, 1920, at the legal rate, and plaintiffs' costs and disbursements to be herein taxed, and that the said plaintiffs have a lien upon said vessel to secure said amounts, and that said lien be, and the same is hereby foreclosed; and

IT IS BY THE COURT FURTHER ORDERED, CONSIDERED, ADJUDGED AND DECREED, that the said vessel be sold, after giving notice according to law, for the payment of said amounts herein adjudged and decreed to be due the respective plaintiffs.

Done in open Court, November 18th, 1921.

WALTER M. FRENCH, Judge.

Costs taxed at \$23.00.

283E Pet. Ex. 3.

Recording fee \$1.00 paid June 22, 1921.

Henry H. Henrichs,

Deputy Collector.

## BILL OF SALE

Seattle, Washington, May 5, 1921.

The Seattle Trawl Fisheries Association, Inc., a corporation, in consideration of ten (\$10.00) dollars the receipt of which is hereby acknowledged, hereby quitclaims to the United States Government all its right, title and interest in and to the former sub-chasers known as 292, 293 and 300, the 293 having been changed to the George L. Harvey.

Seattle Trawl Fisheries Association, Inc.,

By Geo. L. Harvey, President,

W. F. Wagner, Secretary and Treasurer.

(Seal)

State of Washington    {  
County of King        { ss.

This is to certify that on this 5th day of May, 1921, personally appeared before me, George L. Harvey, the President of the Seattle Trawl Fisheries Association, and acknowledged the foregoing bill of sale to be free and voluntary act and deed of the corporation for the uses and purposes therein mentioned.

Witness my hand and official seal this 5th day of May, 1921.

(Seal)

Moncrieffe Cameron,

Notary Public in and for the State of  
Washington, residing at Seattle.

Customs House, Seattle, Wash., June 22, 1921.

Received for record, 2:00 P. M.

Recording Book M8, page 292,

Recording fee \$1.00 paid June 22, 1921.

Henry H. Henrichs,

Act. Deputy Collector.

I certify this to be a true copy of the original  
bill of sale on file in this office.

Henry H. Henrichs,

Act. Deputy Collector.

Customs House, Seattle, Wash.

(Customs House Seal)

May 5th, 1923.

283E Govt. Ex. A.

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Recording fee \$1.00.

Paid June 22, 1921,

Henry H. Henrichs, Deputy Collector.

### BILL OF SALE

KNOW ALL MEN BY THESE PRESENTS, that we,  
George L. Harvey and Joseph Kildall, doing business as the Seattle Fisheries Association, a limited partnership and record owners of the following vessels:

U. S. S. submarine chaser No. 293 (said vessel also being known as the "George L. Harvey"),

U. S. S. submarine chaser No. 292, and U. S. S. submarine chaser No. 300, for and in consideration of the sum of one (\$1.00) dollar lawful money of the United States to each of us in hand paid, the receipt whereof we, and each of us, do hereby acknowledge, and other valuable consideration to us and each of us hereto specially moving by us and each of us, our and each of our heirs, executors, administrators and assigns, have demised, released and forever quitclaim, and by these presents do demise, release and forever quitclaim unto the United States of America, all of our right, title and interest in and to U. S. S. submarine chaser No. 293, U. S. S. submarine chaser No. 292, and U. S. S. submarine chaser No. 300, hereby releasing and waiving all rights under and by virtue of the certain transfer of said vessels to us on May twenty-one, Nineteen Hundred Twenty, by the Navy Department of the United States.

Dated this 3rd day of June, 1921.

Seattle Fisheries Association,

George L. Harvey,

Joseph Kildall,

(Seal)

General partners.

State of Washington, }  
County of King,        } ss.

Before me, a Notary Public in and for the State of Washington, personally appeared George L. Har-



vey and Joseph Kildall, and personally known to me as the same persons whose names are subscribed to the annexed instrument of writing, and acknowledged that they signed, sealed and delivered the said instrument of writing as their free and voluntary act for the uses and purposes therein set forth.

Given under my hand and seal this 3rd day of June, A. D., One Thousand Nine Hundred and Twenty-one.

(Seal)                      A. C. McDonald,  
Notary Public in and for the State of  
Washington, residing at Seattle.

Customs House, Seattle, Wash., June 22, 1921.

Received for record, 2:00 P. M.

Recorded Book M8, page 288,

Recording fee \$1.00, paid June 22, 1921.

Henry H. Henrichs, Act. Deputy Collector.

I certify this to be a true copy of the original bill of sale on file in this office.

Henry H. Henrichs,  
Act. Deputy Collector.

Customs House, Seattle, Wash.  
(Customs House Seal) May 5th, 1923.  
283E Govt. Ex. B.

No. 283-E

MEMORANDUM DECISION

Filed July 6, 1923.

James Kiefer, Esq.,  
For Petitioners.

Hon. Thos. P. Revelle, U. S. Attorney,

Hon. John A. Frater, Asst. U. S. Attorney,

Hon. Charles P. Moriarty, Asst. U. S. Attorney,  
For United States.

CUSHMAN, D. J.

This suit is one against the United States under the Tucker Act and has been submitted to the court upon an agreed statement of facts.

The petitioners cannot recover, unless they have shown by a fair preponderance of evidence, the existence of an implied contract, that is an implied promise on the part of the United States to pay the claims against the property, which it took. If the officers of the Government took under claim of right, there can be no implied contract nor such promise in fact.

The circumstances indicate that the officers took under an adverse claim of right, rather than with

recognition of petitioners' claims. Petitioners cannot recover. Judgment accordingly.

Filed in the United States District Court, Western District of Washington, Northern Division, July 6, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

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No. 283-E

## JUDGMENT OF DISMISSAL

BE IT REMEMBERED that this matter came on duly and regularly before this court upon the application of the United States Attorney, and this case having been duly presented to this Court upon an agreed statement of facts and the court having considered the same and having heretofore, to-wit, on the 6th day of July, 1923, filed a Memorandum Decision holding that the defendant was entitled to Judgment, and it now appearing that a Judgment of Dismissal should be entered, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that petitioners take nothing by this action, that the defendant go hence without day.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that costs herein to be taxed be and they hereby are awarded in favor of the defendant and against the petitioners.

To all of which the petitioners except and an exception is allowed.

Done in open court this 14th day of July, 1923.

EDWARD E. CUSHMAN,  
United States District Judge.

O. K. as to form, JAMES KIEFER,  
Attorney for the Petitioners.

Filed in the United States District Court, Western District of Washington, Northern Division, July 14, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

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No. 283-E

## PETITION FOR APPEAL

Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martinsen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog,

Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., the petitioners above named, deeming themselves aggrieved by the order and judgment entered on the 14th day of July, 1923, in the above entitled proceedings, do hereby appeal from the said judgment to the United Circuit Court of Appeal for the Ninth Circuit, and pray that a transcript and record of proceedings and papers upon which said judgment is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

JAMES KIEFER,

Attorney for Petitioners.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

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No. 283E

## ASSIGNMENTS OF ERROR

Come now the petitioners, Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martin-



sen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog, Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., and assign error in the decision of the said District Court as follows:

I.

The said Court erred in holding, concluding and adjudging that the petitioners are not entitled to recover against the United States of America herein.

II.

The Court erred in making its conclusion of law to the effect that the petitioners are not entitled to recover herein.

III.

The Court erred in making and entering its judgment herein dismissing the petition and action of the petitioners, and in entering judgment of dismissal herein against the petitioners.

JAMES KIEFER,  
Attorney for Petitioners and Appellants.

Received copy of the foregoing assignments of error, and due service herein admitted, this 16th day of July, 1923.

THOS. P. REVELLE,  
United States District Attorney for the Western  
District of Washington, and Attorney for the  
United States of America.

By JOHN A. FRATER,  
Assistant United States Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

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No. 283-E

## ORDER ALLOWING APPEAL AND FIXING BOND

Now, to-wit, on this 16th day of July, 1923,

IT IS ORDERED, that the appeal be allowed as prayed for upon the petitioners for said appeal executing a bond to the United States in the sum of two hundred fifty (\$250.00) dollars, conditioned that the appellants shall prosecute their appeal

with effect and answer all judgments and costs if they fail to make their plea good.

EDWARD E. CUSHMAN,  
District Judge.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

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No. 283-E

## NOTICE OF APPEAL

*To the United States of America and to the Attorney General of the United States, and to Hon. Thos. P. Revelle, United States Attorney for the Western District of Washington, and to Hon. John A. Frater and to Hon. Chas. P. Moriarty, Assistant United States Attorneys for the Western District of Washington, and Attorneys for the United States in the Above Entitled Cause:*

You, and each of you, are hereby notified that Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martinsen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog,

Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., petitioners above named, hereby and now appeal from that certain order, judgment and decree made herein by the above entitled Court on the 14th day of July, 1923, adjudging, holding, finding and decreeing that the amended petition of the petitioners herein be dismissed, and that the said petitioners take nothing thereby, and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

JAMES KIEFER,

Attorney for said Petitioners and Appellants.

Received copy of foregoing Notice of Appeal and due service is hereby admitted this 16th day of July, 1923.

THOS. P. REVELLE,

United States District Attorney for the  
Western District of Washington,

By JOHN A. FRATER,

Asst. United States District Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,

By S. E. Leitch, Deputy.

No. 283-E

## CITATION

*To the United States of America and to the Attorney General of the United States, and to Hon. Thos. P. Revelle, United States Attorney for the Western District of Washington, and to Hon. John A. Frater and to Hon. Chas. P. Moriarty, Assistant United States Attorneys for the Western District of Washington, and Attorneys for the United States in the Above Entitled Cause:*

WHEREAS, Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martinsen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog, Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., have lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment, order and decree lately rendered in the District Court of the United States for the Western District of Washington, made in favor of the United States, adjudging and decreeing that the petition of said above named petitioners be dismissed and that they take nothing thereby, and having filed the security required by law and the order of said Court, you are therefore cited to appear before the said United States Circuit Court of Appeals, in the City of San Francisco,



State of California, on the 31st day of July next, to do and receive what may obtain to justice to be done in the premises.

GIVEN under my hand at the City of Seattle, in the Ninth Circuit, this 16th day of July, in the year of our Lord, One Thousand Nine Hundred and Twenty-three, and the Independence of the United States the One Hundred and Forty-eighth.

EDWARD E. CUSHMAN,  
Judge of the United States District Court for  
the Western District of Washington.

Received copy of foregoing Citation and due service is hereby admitted, this 16th day of July, 1923.

THOS. P. REVELLE,  
United States District Attorney for the  
Western District of Washington.

By JOHN A. FRATER,  
Asst. United States District Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

No. 283-E

## APPEAL BOND

KNOW ALL MEN BY THESE PRESENTS: That we, Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martinsen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog, Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., as principals, and the National Surety Co., a surety corporation under the laws of the State of New York, and lawfully doing business in the State of Washington, are held and firmly bound to the United States of America, in the full and just sum of two hundred fifty (\$250.00) dollars, to be paid to the United States of America, for which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 16th day of July, in the Year of Our Lord One Thousand Nine Hundred Twenty-three.

WHEREAS, lately at a District Court of the United States for the Western District of Washington, Northern Division, in a proceeding pending in said Court, to-wit, a petition by the above named principals against the United States of America, de-

fendant, the Court upon final hearing made and entered a judgment and decree in said cause dismissing the same and denying the petitioners any relief; and

WHEREAS, the above named principals have appealed from said judgment and decree in said cause to the Circuit Court of Appeals for the Ninth Circuit, and have obtained a citation directed to the United States and to the Attorney General thereof, and to the United States District Attorney for the Western District of Washington, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in said Circuit, on the 31st day of July next.

Now the condition of this obligation is such that if the said Bacon & Matheson Forge Co., John Paul Lumber Company, Schwabacher Hardware Co., Axel Olsen, Charles Martinsen, West Seattle Boat & Engine Co., M. H. Martinsen, E. L. Martinsen, Fred Skoog, Walter Turnquist, Christ Christensen, J. A. Engstrom, R. M. Pendleton and H. G. McLaughlin Co., shall prosecute their said appeal to effect and answer all damages and costs, if they fail to make the said plea good, then this obliga-

tion to be void, else to be and remain in full force and virtue.

Bacon & Matheson Forge Co.,  
John Paul Lumber Company,  
Schwabacher Hardware Co.,  
Axel Olsen,  
Charles Martinsen,  
West Seattle Boat & Engine Co.,  
M. H. Martinsen,  
Fred Skoog  
Walter Turnquist,  
Christ Christensen,  
J. A .Engstrom,  
R. M. Pendleton,  
H. G. McLaughlin,  
E. L. Martinsen,

By James Kiefer,  
Their Attorney.

NATIONAL SURETY COMPANY  
W. C. White, President  
J. Grant, Resident Assistant Secretary.

July 16, 1923, foregoing bond approved.

EDWARD E. CUSHMAN, Judge.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

**In the District Court of the United States for  
the Western District of Washington, North-  
ern Division.**

No. 283-E

BACON & MATHESON FORGE CO., JOHN  
PAUL LUMBER COMPANY, SCHWABACHER  
HARDWARE CO., AXEL OLSEN, CHARLES  
MARTINSEN, WEST SEATTLE BOAT & EN-  
GINE CO., M. H. MARTINSEN, E. L. MARTIN-  
SEN, FRED SKOOG, WALTER TURNQUIST,  
CHRIST CHRISTENSEN, J. A. ENGSTROM, R.  
M. PENDLETON and H. G. McLAUGHLIN CO.,  
Petitioners.

vs.

UNITED STATES OF AMERICA,

---

**STIPULATION AS TO RECORD**

---

IT IS STIPULATED, by and between the petitioners,  
by their attorney, and the United States, by its  
attorneys, that this cause was begun by filing of  
the petition, and thereafter an amended petition,  
under the Act of March 3, 1887, commonly known  
as the Tucker Act; that due and proper service  
was made; that the United States appeared in due



course and answered, and that this cause was submitted upon an Agreed Statement of Facts which superceded the pleadings in the cause;

That the Record on Appeal shall be made up of the following papers:

Agreed Statement of Facts, filed July 2, 1923;  
Memorandum Decision of the Court;  
Judgment of Dismissal; and  
Appeal Papers;

and that in certifying and printing the record the caption, after the first appearance thereof in the record, may be omitted.

Dated Seattle, Washington, July 17, 1923.

JAMES KIEFER,  
Attorney for Petitioners.

THOS. P. REVELLE,  
United States District Attorney for the  
Western District of Washington, and  
Attorney for the United States.

By JOHN A. FRATER,  
Asst. United States District Attorney.

Filed in the United States District Court, Western District of Washington, Northern Division, July 16, 1923.

F. M. Harshberger, Clerk,  
By S. E. Leitch, Deputy.

## CLERK'S CERTIFICATE

Western District of Washington, }  
United States of America, } ss.

I, F. M. Harshberger, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 57 printed pages, 1405 inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as same appears upon the record of this cause and appeal, and as the same remain of record and on file in the office of the Clerk of said Court, and that the same constitute the record on appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington to the Circuit Court of Appeals for the Ninth Circuit, according to stipulation as to record between counsel for parties.

I further certify that I hereto attach and herewith transmit the original citation in this cause.

I further certify that the cost of preparing the foregoing record on appeal, and printing the same, is the sum of \$92.60, to-wit: \$11.60 Clerk's fees and \$81 printing, and that the said sum has been paid by James Kiefer, Attorney for Appellants.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, on this 27th day of July, 1923.

F. M. HARSHBERGER,  
Clerk of the United States District Court for  
the Western District of Washington.



United States <sup>9</sup>

# Circuit Court of Appeals

For the Ninth Circuit.

---

BANKERS DISCOUNT CORPORATION, a Corporation, and COAST SHIPBUILDING COMPANY, a Corporation,

Appellants,

vs.

STEAMSHIP "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. RANSON, Trustee, and J. V. MASON, and UNITED SHEET METAL WORKS, a Corporation,

Appellees.

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## Apostles on Appeal.

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Upon Appeal from the United States District Court for the District of Oregon.

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FILED

SEP 13 1911

F. H. MASON, CLERK





**United States**  
**Circuit Court of Appeals**  
**For the Ninth Circuit.**

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BANKERS DISCOUNT CORPORATION, a Corporation, and COAST SHIPBUILDING COMPANY, a Corporation,

Appellants,

vs.

STEAMSHIP "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. RANSON, Trustee, and J. V. MASON, and UNITED SHEET METAL WORKS, a Corporation, Appellees.

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**Apostles on Appeal.**

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Upon Appeal from the United States District Court for the District of Oregon.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## **Names and Addresses of Attorneys of Record.**

WINTER & MAGUIRE, Title & Trust Building,  
Portland, Oregon, for the Bankers Discount  
Corporation, a Corporation, Appellant.

JOSEPH, HANEY & LITTLEFIELD, Corbett  
Building, Portland, Oregon, for F. H. Ransom,  
Trustee, Libellant, and J. V. Mason, Intervening  
Libelants, Appellees.

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In the District Court of the United States for the  
District of Oregon.

No. A-8865.

In the Matter of the Ship "EGERIA," Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel, and Furniture.

F. H. RANSOM, Trustee,

Libellant.

### **Caption.**

On November 17, 1921, a libel was filed in the  
above-entitled court by F. H. Ransom, Trustee, as  
libellant, against the ship "Egeria," her masts, bow-  
sprit, boats, anchors, cables, rigging, tackle, apparel,  
and furniture, and thereupon on said date an order  
was made by the Court directing process to issue  
for the arrest of the said ship, her tackle, etc., and  
directing that notice in the form prescribed by the  
order be published.

On November 17, 1921, a warrant of arrest was duly issued, and thereupon the United States Marshal for the District of Oregon seized and arrested the said ship, her tackle, etc. Said ship was not released from arrest nor any security for her release given.

On December 15, 1921, a claim was filed by the Coast Shipbuilding Company as managing owner of the said steamship, and on said date said Coast Shipbuilding Company filed its answer to the libel herein.

On December 15, 1921, a libel in intervention was filed by J. V. Mason, and

On December 15, 1921, upon leave of the Court first had, a libel in intervention was filed by the United Sheet Metal Works and there was filed with the said libel of intervention a stipulation for costs in the sum of \$250.00, with Adolph Groeger as surety.

On December 15, 1921, by leave of Court, a libel in intervention was filed by the Bankers Discount Corporation, [1\*] a corporation, and with the said libel a stipulation for costs in the sum of \$250.00, with A. H. Lea as surety thereon.

On March 17, 1922, an answer was filed by the libellant to the intervention of the United Sheet Metal Works.

On March 21, 1922, an answer was filed by the libellant to the intervention of the Bankers Discount Corporation, a corporation.

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\*Page-number appearing at foot of page of original certified Apostles on Appeal.

On May 18 and 19, 1922, the cause came on for trial before the Court before the Honorable Charles E. Wolverton, District Judge, upon the pleadings and proofs.

On May 18, 1922, said intervenor Bankers Discount Corporation filed a reply to the answer of the libellant.

On June 15, 1922, a stipulation was filed, signed by proctors for libellant, J. V. Mason, intervenor, and Bankers Discount Corporation, intervenor, that the intervention of J. V. Mason be considered as filed by leave of Court and that the allegations therein be deemed denied under oath by intervening libellant Bankers Discount Corporation.

On September 5, 1922, the opinion of the Court was filed.

On October 7, 1922, final decree was entered.

On October 9, 1922, *venditioni exponas* was issued and placed in the hands of the United States Marshal, and thereupon the said steamship "Egeria," her tackle, etc., was sold by the United States Marshal to F. H. Ransom, Trustee, for the sum of \$52,300.

On April 6, 1923, notice of appeal was filed by the intervenor Bankers Discount Corporation.

Portland, Oregon. July 25, 1923.

G. H. MARSH,

Clerk, United States District Court for the District of Oregon. [2]



In the District Court of the United States for the  
District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 17th day  
of November, 1921, there was duly filed in the Dis-  
trict Court of the United States for the District of  
Oregon, a libel, in words and figures as follows,  
to wit: [3]

In the District Court of the United States for the  
District of Oregon.

In the Matter of the Ship "EGERIA," Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.

F. H. RANSOM, Trustee,

Libellant.

**Libel.**

To the Honorable Charles E. Wolverton and the  
Honorable Robert S. Bean, Judges of the  
Above-entitled Court:

The libellant, F. H. Ransom, Trustee, brings this,  
his libel, against the American vessel "Egeria,"  
which is a vessel of the United States, her masts,  
bowsprit, boats, anchors, cables, chains, rigging,  
tackle, apparel and furniture, and against all those  
intervening for their interest in the same in a cause  
of suit upon a contract, civil and maritime, and  
thereupon alleges:

**I.**

That libellant, F. H. Ransom, Trustee, is a resi-

dent and inhabitant of the State of Oregon and the District of Oregon, and is a citizen of the State of Oregon and of the United States.

## II.

That the vessel "Egeria" is a vessel of the United States, known as a steam screw, of 2360 gross tons of the approximate length of 266.6 feet and 46.1 feet beam, which vessel is duly registered in the American Port of Portland, Oregon, in a permanent register under registry number 10, official number 220478, lettered MBGQ, and the date of which registry is September 21, 1920, and which vessel has at all times since said registration been engaged in coastal trade on the West Coast of the United States, and which vessel is now on the maritime waters of the United States in the Port of Portland, Oregon, and within the jurisdiction of this court.

## III.

That said ship "Egeria" is owned by the parties and in the interests as in this paragraph set out, to wit:

Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, [4] Trustee, 2/100, Retta Bishop Clarkson 1/350, Columbia Wire and Iron Works 1/100, Eastern and Western Lumber Co. 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Holbrook 1/140, E. H. James 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100,

Gus Kuhn 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H. Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood 1/100, Paul C. Bates 1/100, G. W. Herron 1/100, L. B. Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100 of Eugene, Oregon, which are the sole and only owners thereof.

## IV.

That Coast Shipbuilding Company is now, and during all the times herein mentioned was, the managing owner of said vessel.

## V.

That theretofore, and on the 1st day of March, 1921, in the City of Portland, Oregon, and within the District of Oregon, and within the jurisdiction of this Court, the said Coast Shipbuilding Company, as managing owner of said vessel, and for and on behalf of the owners of said vessel, made, executed and delivered to this libellant, F. H. Ransom, Trustee, a certain promissory note in words and figures as follows, to wit:

\$35,000.00.                      Portland, Oregon, March 1, 1921.

On or before two years after date, without grace, we promise to pay to the order of F. H. Ransom, Trustee, Thirty-five thousand dollars in Gold Coin of the United States of America, of the present standard value, with interest thereon in like Gold

Coin at the rate of ten per cent per annum from date until paid, for value received. Interest to be paid semi-annually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for Attorney's fees to be allowed in said suit or action.

\$7.00 Revenue Stamps cancelled.

S. S. "EGERIA" AND OWNERS.

By COAST SHIPBUILDING COMPANY,

Managing Owner,

By DONALD W. GREEN,

Secretary.

## VI.

That, for the purpose of securing the payment of said promissory note, in accordance with the terms thereof, on the 1st day of March, 1921, at Portland, Oregon, and within the jurisdiction of this Court, the said Coast Shipbuilding Company, as managing owner of said vessel, and for and on behalf of the owners thereof, made, executed [5] and delivered to the libellant a certain mortgage whereby it, the said managing owner, bargained, sold and mortgaged said vessel, its masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, to this libellant for said purpose, which mortgage was thereafter duly and regularly recorded in



the office of the Collector of Customs for the District of Oregon, at the Port of Portland, Oregon, on the 23d day of March, 1921, in Book G of Mortgages, at Folio 77 thereof, in said office, a copy of which mortgage, marked "A," is attached hereto, referred to and made a part hereof.

#### VII.

That, pursuant to the terms of said mortgage and said note, there became due and owing thereon from said vessel and her owners, to F. H. Ransom, Trustee, the libellant herein, interest at the rate of ten per cent per annum upon the sum of \$35,000.00 for the period of six months, which interest was due and payable on September 1, 1921, but which interest has not been paid in accordance with the terms of said note or otherwise to the said F. H. Ransom, Trustee, by the said ship "Egeria," or by her owners, which interest is now in default.

#### VIII.

That it is provided in said note and said mortgage that the interest upon said note, at the rate of ten per cent per annum from date until paid shall be paid semi-annually, and that, if said interest is not so paid, the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of said note.

#### IX.

That by reason of the failure of said ship, her managing owner and owners to pay said interest, as provided in said note, there is now due and owing from said ship, her managing owner and owners to the libellant F. H. Ransom, Trustee, the



full sum of \$35,000.00 together with interest thereon at the rate of ten per cent per annum from and after the 1st day of March, 1921. [6]

### X.

That libellant herein, F. H. Ransom, Trustee, is now and at all the times since the execution of said note has been the owner and holder thereof, and by reason of the default in the payment of interest upon said note, said libellant has elected and hereby elects to exercise his option and declares the whole sum of the principal and interest of said note due and collectible.

### XI.

That it is further provided in said note and in said mortgage that, in case suit or action is instituted to collect said note, or any portion thereof, the makers of said note shall pay, in addition to the costs and disbursements provided by statute, such additional sum as the Court may adjudge reasonable as attorney's fees to be allowed in said suit or action, and that the sum of \$3500.00 is a reasonable sum to be allowed as such attorney's fees.

### XII.

That it is provided in and by the terms of said mortgage that the party of the first part named therein, to wit: The ship "Egeria," her owners and managing owner, should, during all of the lifetime of said mortgage, procure the said steam screw, ship or vessel to be insured against loss or damage by fire and against all marine risks and disasters in a good responsible insurance company or companies to be selected and approved by the party of the second

part mentioned in said mortgage, to wit: F. H. Ransom, Trustee, for an amount at least equal to the amount unpaid upon said indebtedness and the interest thereon, and that they, the said ship "Egeria," owners and managing owner should keep such policy or policies renewed from time to time and keep the same valid at all times for such amount, and that they, the said first parties should immediately assign and deliver to the said second party said policy or policies of insurance, having first duly obtained the proper consent of said insurance company or companies to such assignment, and that they, the said first parties, should also promptly deliver to the said second party the renewal certificates of said policies as collateral [7] security for the payment of said indebtedness, and that if said first parties should fail to immediately procure, assign and deliver such policy or policies, or should at any time fail to renew the same, and deliver said renewal certificates thereof to the said party of the second part, or his assigns, then and in such event the said party of the second part is by said mortgage authorized to procure such insurance and keep the same renewed, and such amount as he shall pay therefor shall be deemed and considered an additional indebtedness secured by said mortgage, which said additional indebtedness shall be repaid to said party of the second part on demand, and shall bear interest at ten per cent per annum from the time of such payment until repaid.

### XIII.

That the parties of the first part mentioned in

said mortgage, to wit: The ship "Egeria," her owners and managing owner, failed, neglected and refused to keep said ship so insured as in said mortgage provided, and that the libellant herein, in accordance with the terms of said mortgage, secured said insurance upon said vessel at an expense and cost to himself in the sum of \$2,010.26.

#### XIV.

That libellant herein, F. H. Ransom, Trustee, has demanded repayment to himself of the sum of \$2,010.26, the money expended by him in payment of insurance upon said vessel, in accordance with the terms of said mortgage, from said ship "Egeria," her owners and managing owner, but that said sum has not yet been paid, and is now due and owing from said ship, her owners and managing owner to this libellant, F. H. Ransom, Trustee, and became and is an indebtedness secured by said mortgage.

WHEREFORE, libellant prays that process in due form of law, in accordance with the practice of this Court, issue against said ship "Egeria," her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture and that she may be condemned and sold to answer for the moneys due as herein alleged in this libel or in any amendment thereof, and that this Court will hear the evidence which libellant will adduce in support of the allegations [8] of the libel, and will enter a decree in favor of the libellant in the sum of \$35,000.-00, together with interest thereon at the rate of ten per cent per annum from and after March 1, 1921,

and the further sum of \$2,010.26, together with interest thereon at the rate of ten per cent from and after — 1, 1921, and the further sum of \$3,500.00 as an attorney's fee herein, in order that said sums may be paid and satisfied out of the proceeds of the sale of said ship "Egeria," together with costs of libellant, and otherwise let right and justice administer in the premises.

JOSEPH, HANEY & LITTLEFIELD,  
Proctors for Libellant.  
F. H. RANSOM,  
Trustee.

United States of America,  
District of Oregon,—ss.

I, F. H. Ransom, Trustee, being first duly sworn, depose and say that I am the libellant hereinabove named; that I have read the foregoing libel, know the contents thereof, and that the same is true as I verily believe.

F. H. RANSOM,  
Trustee.

Subscribed and sworn to before me this 17th day of November, 1921.

[Notarial Seal]

B. E. HANEY,  
Notary Public for Oregon.

My commission expires 9/ 7/ 24. [9]



Copy of original Mortgage held by F. H. Ransom,  
Trustee.

DEPARTMENT OF COMMERCE.

Bureau of Navigation.

Upon receipt of this form by the Collector, duly executed, the time when received will be at once noted thereon, in its proper place (page 3), and record will be made as soon thereafter as practicable.

MORTGAGE OF REGISTERED VESSEL.

From COAST SHIPBUILDING COMPANY,  
H. B. Ainsworth and all other owners of  
steam screw "Egeria" to F. H. Ransom, Trustee. To all to whom these presents shall come,  
GREETING:

Know ye, that Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee 2/100, Retta Bishop Clarkson 1/350, Columbia Wire and Iron Works 1/100, Eastern and Western Lumber Co. 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Hollbrook 1/140, E. H. James 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H.



Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood 1/100, Paul C. Bates 1/100, G. W. Herron 1/100, L. B. Menefee 12/140, all of the City of Portland, State of Oregon, and Bird Rose 1/100 of the city of Eugene, State of Oregon, and sole owners

KNOW YE, that (insert names of mortgagors) of the — of — in the State of and — owner of the steam screw or vessel [10] called the "Egeria," of the burden of 1379 net register tons, or thereabouts, of the first part, being justly indebted to F. H. Ransom, Trustee, of Portland, Oregon, in the State of Oregon, of the second part, in the sum of Thirty-five Thousand Dollars (\$35,000.00) Dollars, upon a note for \$35,000 dated March 1, 1921, due on or before two years after date with interest at ten per cent (10%) per annum, payable semiannually has, for the purpose of securing the payment of the said debts, and the interest thereon, bargained, sold, and mortgaged and by these presents do bargain, sell, and mortgage unto the said party of the second part, his executors, administrators, and assigns, all of said steam screw or vessel, together with all of the masts, bowsprit, boats, anchors, cables, chains, tackle, apparel; furniture, and all other necessities thereunto appertaining and belonging. The certificate of the last register of the said steam screw or vessel is in the words and figures following, to wit:

Permanent	Official
Register	Number
No. 10	220,478
	Letters
	MBGQ

IN PURSUANCE OF CHAPTER ONE,  
TITLE XLVIII, "Regulation of Com-  
merce and Navigation," Revised  
Statutes of the United States.

D. W. Green, Secretary, Coast Shipbuilding Com-  
pany, Managing Owner, of Portland, Oregon, hav-  
ing taken and subscribed the oath required by law,  
and having sworn that

Coast Shipbuilding Company 39/100, H. B. Ains-  
worth 1/100, J. C. Ainsworth 1/100, Boston Packing  
Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley  
1/200, Sophia Batterson, Trustee 2/100, Retta  
Bishop Clarkson 1/350, Columbia Wire and Iron  
Works 1/100, Eastern and Western Lumber Co.  
7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100,  
Gillen & Chambers Co. 2/100, Carrie A. Hollbrook  
1/140, E. H. James 1/100, James B. Kerr 31/700,  
M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn  
1/100, Meier & Frank Co. 1/100, Olds, Wortman  
[11] & King 1/100, Oregon Brass Works 1/200,  
Overmire Steel Construction Co. 8/100, Jaeger  
Brothers 1/100, David Dahm 1/100, C. A. Park  
1/100, Portland Marine Supply Co. 2/100, A. H.  
Harding 1/200, R. M. Tuttle 1/200, Rasmussen &  
Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott  
1/100, Ben Selling 1/100, C. E. S. Wood 1/100,  
Paul C. Bates 1/100, G. W. Herron 1/100, L. B.

Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100 of Eugene, Oregon, are the only owners, of the vessel called the "Egeria," of Portland, Oregon, whereof A. A. Sawyer is at present master, and is a citizen of the United States, and that the said vessel was built in the year 1920, at Portland, Oregon, of wood, as appears by P. R. #7, issued at Portland, Oregon, Sept. 9, 1920, now surrendered: Ownership changed and said Register having certified that the said vessel is a steam screw; that she has 1 deck, 2 masts, a sharp head, and an elliptical stern; that her register length is 266.6 feet; her register breadth 46.1 feet; her register depth 24 feet; her height — feet; that she measures as follows:

		Tons	100ths
Capacity under tonnage deck		2064	46
Capacity between decks above tonnage deck			
Capacity of inclosure on the upper deck, viz.: Fore-castle 36.32; bridge —; poop 131.69; break —;			
houses-round 116.49; side —; chart —; radio —; excess hatchways 11.78; light and air —;		296	28
Gross Tonnage		2360	74
Deductions Under Section 4153, Revised Statutes, as amended:			
Crew space	146.71	Master's cabin	23.85
Steering gear		Anchor gear	21.18
		Boatswain's stores	22.66
Chart house	6.13	Donkey engine and boiler	
		Radio house	5.15
Storage of Sails		Propelling power (actual space 370.87), 32%	755.43
Total deductions		981	11
Net tonnage		1379	—

The following described spaces, and no others, have been omitted viz.: Forepeak used for water ballast,       aftpeak used for water ballast companion, skylights .26, open bridge, open poop       ; open shelter deck 2.16       ; steering gear 22.66; Other Mach. Spaces 2.49  
donkey engine and boiler       ; light and air 64.90; wheelhouse 6.83, galley 10.29, condenser water-closets 15.00, cabins open pasway 3.16  
and the said vessel has been duly registered at this Port.

GIVEN under my hand and seal, at the Port of Portland, Oregon, this 21st day of September, in the year one thousand nine hundred and twenty.

None

L. A. PIKE,

---

Naval Officer (Seal)

---

Special Deputy Collector of Customs  
(Seal)

EUGENE TYLER CHAMBERLAIN,

Commissioner of Navigation (Seal)

TO HAVE AND TO HOLD the said Steam Screw or vessel and all the other before-mentioned appurtenances unto him and the said F. H. Ransom, Trustee, and to his executors, administrators, and assigns, to the sole and only proper use, benefit and behoof of ——— the said F. H. Ransom, Trustee, and to his executors, administrators and assigns, forever:

PROVIDED ALWAYS, and the condition of these presents is such, that if the said parties of the first part, their successors, executors or admin-



istrators, shall pay or cause to be paid, to the said party of the second part, his executors, administrators, or assigns, the debt aforesaid, with the interest thereon, at the time or times and in the manner following, to wit: according to the tenor of a note for \$35,000.00 dated March 1, 1921, in form and figures substantially as follows, to wit:

\$35,000.00      Portland, Oregon, March 1, 1921.

On or before two years after date, without grace, we promise to pay to the order of F. H. RANSOM, TRUSTEE, Thirty-five Thousand Dollars in Gold Coin of the United States of America, of the present [13] standard value, with interest thereon in like Gold Coin at the rate of ten per cent per annum from date until paid, for value received. Interest to be paid semiannually, and if not so paid, the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note, or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, such additional sum, in like Gold Coin, as the Court may adjudge reasonable, for attorney's fees to be allowed in said suit or action.

S. S. "EGERIA" AND OWNERS.

\$7.00 Revenue stamps cancelled by

COAST SHIPBUILDING COMPANY,

Managing Owner,

By Donald W. Green,

Secretary,



then these presents shall be void and of no effect, subject, however, to the provisions hereinafter contained; and the said parties of the first part hereby agree to pay the debt aforesaid, and interest thereon, and to fulfill and perform each and every one of the covenants and conditions herein contained.

BUT IF DEFAULT be made in such payments, or in any one of such payments, or if default be made in the prompt and faithful performance of any of the covenants herein contained, or if the said part of the second part shall at any time deem himself in danger of losing said debt, or any part thereof, by delaying the collection thereof until the expiration of the time above limited for the payment thereof, or if said parties of the first part shall sell or attempt to sell said property, or any part thereof, or if the same shall be levied upon or taken by virtue of any attachment or execution against said first parties, or if said first parties shall suffer and permit said vessel to be run in debt to an amount exceeding in the aggregate the sum of exclusive of this [14] obligation Sixty Thousand and no/100 (\$60,000.00) dollars, or if the said first part shall negligently or willfully permit said property to waste, or be damaged or destroyed, said party of the second part is hereby authorized to take possession of said goods, chattels, and personal property at any time, wherever found, either before or after the expiration of the time aforesaid, and to sell and convey the same, or so much thereof as may be necessary to satisfy the said debt, interest, and reasonable expenses, after

first giving a notice of twenty (20) days, to be given by publication in some newspaper published in the City of Portland, State of Oregon, and to retain the same out of the proceeds of such sale; the surplus (if any) to belong and to be returned to said parties of the first part.

And it is AGREED that on such sale the parties of the first part, their executors, administrators, successors or assigns, may become the purchasers.

And the said part      of the first part do further covenant and agree, to and with the said party of the second part, his executors, administrators, and assigns, that they will immediately procure said steam screw or vessel to be insured against loss or damage by fire, and against all marine risks and disasters, in some good and responsible insurance company or companies, to be selected and approved by the said party of the second part, for an amount at least equal to the amount which shall from time to time remain unpaid upon the said indebtedness and interest thereon, and that they will keep such policy or policies renewed from time to time, and keep the same valid at all times for the amount aforesaid; that they will do, suffer, or permit to be done, no act whereby said insurance would be liable to be vitiated or forfeited, and that they will immediately assign and deliver to said second [15] party said policy or policies of insurance, having first duly obtained the proper consent of the insurance company or companies to such assignment, and that they will also promptly deliver to said second party the renewal certificate of said

policies as a collateral security for the payment of said indebtedness. And if said first parties shall fail to immediately procure, assign, and deliver such policy or policies as aforesaid, or shall at any time fail to immediately renew the same, and deliver the renewal certificates as aforesaid, the said party of the second part, his executors, administrators, or assigns, is hereby authorized to procure said steam screw or vessel to be insured as aforesaid, and to keep the policy or policies renewed; and the amount which he has to pay therefor shall be considered, and is hereby declared to be, an additional indebtedness hereby intended to be secured, and shall be repaid to said party of the second part, his executors, administrators, or assigns, on demand, and shall bear interest at ten (10) per cent from the time of such payment until repaid.

AND IT IS HEREBY PROVIDED, that it shall be lawful for said first parties, their executors, successors and administrators, to retain possession of the property hereby mortgaged, and at their own expense to use and enjoy the same until said indebtedness shall become due, unless said second party should at any earlier date declare this mortgage forfeited for nonperformance of any of the covenants herein contained, or by virtue of any authority hereby conferred on said second party.

IN TESTIMONY WHEREOF, the said Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee 2/100, Retta

Bishop Clarkson 1/350, Columbia Wire and Iron Works 1/100, Eastern and Western Lumber Co. [16] 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Hollbrook 1/140, E. H. James 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H. Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood 1/100, Paul C. Bates 1/100, G. W. Herron 1/100, L. B. Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100, of Eugene, Oregon, owners of the steam screw "Egeria," have hereunto set their hands this first day of March, in the year one thousand nine hundred and twenty-one.

Signed and delivered in

the presence of:

Charles E. McCulloch

Robt. B. Kuykendall

Coast shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee, 2/100, Retta Bishop Clarkson 1/350, Columbia Wire and Iron Works 1/100,



Eastern and Western  
Lumber Co. 7/100, Ed-  
ward Ehrman 1/100, J.  
K. Gill Co. 1/100, Gillen  
& Chambers Co. 2/100,  
Carrie Hollbrook 1/140,  
E. H. James 1/100, James  
B. Kerr 31/700, M. L.  
Kline Co. 1/100, L. A.  
Lewis 1/100, Gus Kuhn  
1/100, Meier & Frank Co.  
1/100, Olds, Wortman &  
King 1/100, Oregon Brass  
Works 1/200, Overmire  
Steel Construction Co.  
8/100, Jaeger Brothers  
1/100, David Dahm 1/100,  
C. A. Park 1/100, Port-  
land Marine Supply Co.  
2/100, A. H. Harding  
1/200, R. M. Tuttle 1/200,  
Rasmussen & Co. 1/100,  
Roberts Bros. 1/100, A.  
B. & L. M. Scott 1/100,  
Ben Selling 1/100, C. E.  
S. Wood 1/100, Paul C.  
Bates 1/100, G. W. Her-  
ron 1/100, L. B. Menefee  
12/140, all of Portland,  
Oregon, and Bird Rose



1/100 of Eugene, Oregon,  
Owners of the S. S.  
“EGERIA.”

By

COAST SHIPBUILDING CO. MANAG-  
ING OWNER,

By

Coast S. B. Co.  
Seal affixed.

Donald W. Green,  
Secretary. [17]

State of Oregon,  
County of Multnomah,—ss.

On this 1st day of March, 1921, before me appeared Donald W. Green, to me personally known, who, being duly sworn, did say that he is secretary of Coast Shipbuilding Company, Managing Owner of S. S. “Egeria,” and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation as Managing Owner of said S. S. “Egeria” by authority of its board of directors, and said Donald W. Green acknowledged said instrument to be the free act and deed of said corporation and of the Owners of the S. S. “Egeria” by virtue of its appointment as Managing Owner.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

[Notary Seal Affixed]

ROBT. B. KUYKENDALL,  
Notary Public for Oregon.

My commission expires Sept. 1, 1924.

Received for record on the — day of March 23, 1921, A. D., at — o'clock, — M.

COLLECTOR OF CUSTOMS. [18]

Cat. No. 1348. Department of Commerce. Bureau of Navigation. Mortgage on S/S "Egeria" from owners S/S "Egeria" to F. H. Ransom, Trustee. Office of Collector of Customs, District of Oregon, Port of Portland, Oregon.

Received for record on the 23d day of March, A. D. 1921, at 4:00 o'clock P. M., and recorded in Liber G. of Mortgages, folio 77, etc.

L. A. PIKE,  
Collector of Customs.

Spl. D. F.

Libel Filed November 17, 1921. G. H. Marsh,  
Clerk. [19]

---

AND AFTERWARDS, to wit, on the 15th day of December, 1921, there was duly filed in said court a libel of J. V. Mason in intervention in words and figures as follows, to wit: [20]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

In the Matter of the Ship "EGERIA" Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.

### **Petition in Intervention.**

Libel of Claimant J. V. Mason.

To the Honorable Chas. A. Wolverton and Robt. S. Bean, Judges of the Above-entitled Court:

The libellant and intervenor, J. V. Mason makes this his libel against the American vessel "Egeria," which is a vessel of the United States, her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, and against all those intervening for their interest in the same in a cause of suit upon a contract, civil and maritime, and thereupon alleges:

#### **I.**

That libellant, J. V. Mason, is a resident and inhabitant of the State of Oregon and the District of Oregon, and is a citizen of the State of Oregon and of the United States.

#### **II.**

That the vessel "Egeria" is a vessel of the United States known as a steam screw, of 2360 gross tons of the approximate length of 266.6 and 46.1 feet beam, which vessel is duly registered in the American port of Portland, Oregon, in a permanent register under registry number 10, official number 220,478, lettered MBGQ, and the date of which registry is September 21, 1920, and which vessel has at all times since said registration been engaged in coastal trade on the West Coast of the United States, and which vessel is now on the maritime waters of the

United States in the port of Portland, Oregon, and within the [21] jurisdiction of this Court.

### III.

That said ship "Egeria" is owned by the parties and in the interests as in this paragraph set out, to wit:

Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee, 2/100, Retta Bishop Clarkson 1/350, Columbia Wire and Iron Works 1/100, Eastern and Western Lumber Co. 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Hollbrook 1/140, E. H. James 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn, 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H. Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood 1/100, Paul C. Bates 1/100, G. W. Herron 1/100, L. B. Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100, of Eugene, Oregon.

Which are the sole and only owners thereof.

### IV.

That the Coast Shipbuilding Company is now, and during all the times herein mentioned was, the managing owner of said vessel.



## V.

That heretofore and on the 18th day of October, 1921, one C. J. Swenson was the master of said ship and as such master advanced and paid for and on behalf of said ship at the port of San Pedro in the State of California, United States of America, certain charges consisting of wages for officers and crew, repair bills incurred for work upon said ship and other incidental expenses for moneys necessary to move said ship from said port of San Pedro and other moneys on account of light-erage, portage and moving said ship in the sum total of \$6,653.86. That said money so expended by said captain are itemized and set forth upon the sheet marked "A" attached hereto and made a part hereof.

## VI.

That thereafter and on the 26th day of October, 1921, the said C. J. Swenson, master of said ship, sold and assigned said [22] claim against said ship in the amount of \$6,653.86 to libellant, J. V. Mason, who at all times since said date has been and now is the owner and holder thereof.

## VII.

That there is now due and owing from said ship, her owners and managing owner, to this libellant, the full sum of \$6,653.86.

For a second and additional libel, libellant J. V. Mason realleges all of the allegations contained in Paragraphs I to IV inclusive as alleged in libellant's first libel herein with the same force and effect as if the same were fully set forth herein.



II.

That libellant J. V. Mason between the 1st day of November, 1921, and the 20th day of November, 1921, at the request of the mortgagee, F. H. Ransom, Trustee, and with the knowledge and consent of the managing owner of said ship, advanced moneys for and on behalf of said ship and in payment of claims against said ship incurred for wharfage, towing, lighterage and supplies furnished to and for said ship, the full sum of \$645.51.

III.

That said moneys so expended were necessarily expended so that ship could be moved to her home port, to wit: Portland, Oregon, and that said ship, her owners and managing owner thereby became and are indebted to this libellant in the full sum of \$645.51.

For a third and further libel herein libellant J. V. Mason realleges: [23]

I.

All of the allegations contained in Paragraphs I to IV inclusive as set forth in this libellant's first libel contained herein with all the force and effect as if the same were herein set forth.

II.

That on December 12, 1921, the said ship "Egeria" was indebted to the port of Portland, a municipal corporation, in the sum of \$82.40 for services rendered to and upon said ship to the Columbia bar pilots in the sum of \$42.26, and to the Columbia River pilots in the sum of \$65.00, and to Geo. Hawkins, a watchman employed upon said ship in the

sum of \$200.00, and to the Portland Lumber Company, a corporation, for wharfage in the sum of \$100.00, and to the Commissioner of Public Docks of the city of Portland, a municipal corporation, in the sum of \$48.24, and to the St. Helens Ship Company, a corporation, in the sum of \$100.00, and to the United States National Bank, a corporation, in the sum of \$45.20, and to the State Laundry, a corporation, in the sum of \$38.65, and to the Commercial Advertising Company in the sum of \$28.38, and to the Commercial Advertising Company in the sum of \$20.66, and to the port of Portland in the further sum of \$82.40, or in all a total of \$856.13.

### III.

That said claimants in the last paragraph herein set forth and each of them have sold and assigned their claims as in said paragraph set forth, to this libellant who is now the owner and holder thereof and that said claims and each of them constitute an indebtedness against said vessel, her owners and managing owner in the sums therein set forth, said indebtedness [24] having been incurred by said vessel in the necessary operation thereof and for necessary work done upon said vessel and for necessary supplies furnished thereto.

### IV.

That said vessel, the owners and managing owner became thereby and are indebted to this libellant in the sum of \$856.13.

WHEREFORE, libellant, J. V. Mason, prays that he be allowed to intervene herein, that his claims

as set forth herein be considered by this Court in this proceeding, that process in accordance with the practice of this Court issue against said ship, her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, and that said ship, her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, be condemned and sold to answer for the moneys as herein alleged in this libel or any amendment thereof and that this Court will hear the evidence which said libelant will adduce in support of the allegations hereof and will enter a decree in favor of this libelant in the sum of \$8,155.50, together with interest thereon at the rate of 6% per annum from and after December 1st, 1921, in order that said sums be paid and satisfied out of the proceeds of said ship "Egeria" together with the costs of this libelant, and otherwise let right and justice administer in these premises.

JOSEPH, HANEY & LITTLEFIELD,

Proctors for Libelant, J. V. Mason.

United States of America,

District of Oregon,—ss.

I, J. V. Mason, being first duly sworn, depose and [25] say, That I am the libelant hereinabove named; that I have read the foregoing libel, know the contents thereof, and that the same is true as I verily believe.

J. V. MASON.

Subscribed and sworn to before me this 14th day  
of December, 1921.

[Seal]

B. E. HANEY,

Notary Public for Oregon.

Commission expires 9-7-24.

“A.”

### MASTER'S ACCOUNT.

Oct. 18	Wages paid crew at San Pedro.....	\$2,878.24
Oct. 18	Wages paid crew at San Pedro.....	1,123.93
	Outer Harbor & Dock & Wharf Co...	71.70
	Banning Co.....	22.20
	R. C. Griffith Co. 3 vouchers.....	322.24
	Chas. E. Perham.....	30.00
	J. J. Meany Longshore Labor.....	549.49
	Wilmington Transportation Co.....	40.00
	John J. Monahan Attorney fee.....	312.82
	Avon Transportation Co.....	20.00
	City of Los Angeles.....	68.58
	Homers Music & Picture Shop. ....	1.75
Oct. 26	Portage account at Portland.....	1,008.50
	Due Master as per statement of Coast Shipbuilding Co.....	204.41
		<hr/>
		\$6,653.86
	Owed by Master.....	34.00

Filed December 15, 1921. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 15th day of December, 1921, there was duly filed in said court, a libel of the Bankers Discount Corporation in intervention, in words and figures as follows, to wit: [27]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

Suit No.

F. H. RANSOM, Trustee,

Libelant,

vs.

The Steamship "EGERIA," Her Masts, Bowsprit,  
Boats, Anchors, Cables, Riggings, Tackle,  
Apparel and Furniture.

THE BANKERS DISCOUNT CORPORATION,  
a Corporation,

Intervening Libelant.

**Libel in Intervention.**

To the District Court of the United States for the  
District of Oregon, and to the Honorable  
Charles E. Wolverton and the Honorable Rob-  
ert S. Bean, Judges of said Court, Sitting in  
Admiralty.

The petition of the Bankers Discount Corpora-  
tion, a corporation, for leave to prosecute its libel



in intervention in a cause of action, civil and maritime, to recover for labor done, material and machinery furnished in the building, repairing, fitting, furnishing, and equipping said ship against the said ship "Egeria," her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture and against all persons lawfully intervening for their interest, alleges and shows as follows, to wit:

### I.

That said ship "Egeria" has been attached by the marshal of the above district upon process to wit, arrest and monition, issued out of the above-entitled court upon the libel of said F. H. Ransom, Trustee, libelant, and that she still remains in the custody of the marshal of the above-entitled court and district within the jurisdiction of the above-entitled court.

### II.

That at all times hereinafter mentioned, the Bankers [28] Discount Corporation, was, ever since has been, and now is a corporation duly organized and existing under, and by virtue of the laws of the State of Oregon, having its principal place of business in the city of Portland, Multnomah County, Oregon, within the District of Oregon.

### III.

That the vessel "Egeria," is a vessel of the United States, known as a steam screw, of 2360 gross tons of the approximate length of 266.6 and 46.1 feet beam, which vessel is duly registered in the Ameri-

can Port of Portland, Oregon, and which vessel is now on the maritime waters of the United States in the Port of Portland, Oregon, and within the jurisdiction of this Court.

#### IV.

That said ship "Egeria" is owned by the parties and in the interests as in this paragraph set out, to wit:

Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Co. 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee, 2/100, Retta Bishop Clarkson, 1/350, Columbia Wire and Iron Works 1/100, Eastern and Western Lumber Co. 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Holbrook 1/140, E. H. James, 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H. Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. and L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood, 1/100, Paul C. Bates 1/100, G. W. Heron 1/100, L. B. Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100 of Eugene, Oregon,

who are the sole and only owners thereof.

## V.

That heretofore and on or about the — day of —, [29] A. D. 1920, in the city of Portland and within the District of Oregon, and within the jurisdiction of this court, the owners of said vessel as above named made and entered into a contract with the Coast Shipbuilding Company wherein and whereby said Coast Shipbuilding Company agreed to and subsequently in pursuance thereof, did furnish to the said steamship "Egeria" and to the owners thereof labor, machinery and materials necessary for the building, repairing, fitting, furnishing, and equipping of said vessel the particulars of which labor, materials and machinery, will fully appear in the account hereto annexed, marked Exhibit "A" and made a part hereof amounting in the whole to the sum of \$398,856.99, no part of which sum has been paid except the sum of \$350,000, leaving a balance unpaid of \$48,856.99 together with interest thereon for which this intervening libelant claims a lien.

## VI.

That prior to the filing of this petition, the Coast Shipbuilding Company for a good and valuable consideration, sold and duly, transferred and assigned to the Bankers Discount Corporation, a corporation, the intervening libelant herein, the said claim against the said ship and her owners and in favor of said Coast Shipbuilding Company, and this intervening libelant is now the legal holder and owner thereof.

## VII.

That there is now due and owing to this intervening libelant the full and true sum of \$48,856.99 together with interest thereon from the date this cause of action accrued, to wit: on or about the — day of —, A. D. 1921, together with the further sum of \$5000.00, which this petition alleges [30] to be a reasonable attorneys' fees for which intervening libelant claims a lien, which lien is a first and superior lien against said ship "Egeria," her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture, and against the owners thereof, and is a first and superior lien to the claim of F. G. Ransom, Trustee, Libellant herein.

## VIII.

That all and singular the promises are true, and within the admiralty and maritime jurisdiction of the United States of America and of this Honorable Court, and the said ship "Egeria" is now in the port of Portland within the District of Oregon aforesaid, in the custody of the marshal of the United States as hereinbefore alleged.

Wherefore, this plaintiff prays that it may be allowed to intervene in said cause to recover the amount due for labor, material and machinery, furnished under said contract for the building, repairing, fitting and furnishing, and equipping said ship "Egeria" as enumerated in the said Exhibit "A" hereto attached, and that process of the attachment in due form of law according to the Court of this Honorable Court in cases of admiralty and maritime jurisdiction may issue against the said steamer



“Egeria,” her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, and that her said owners and all other persons having or claiming to have any right, title, or interest therein, may be cited to appear and answer all and singular the matters so articulately propounded, and that this Court will hear the evidence which intervening libelant will adduce in support of the allegations of his libel herein, and that this Honorable Court would be pleased to pronounce for the claim aforesaid with interest, attorneys’ fees to [31] be fixed by the Court, and the costs herein expended and that it is a first and superior lien upon the said ship, and that the said ship “Egeria,” her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture may be condemned and sold to pay the same; and that this intervening libelant may have such other and further relief as in law and justice it may be entitled to receive.

BANKERS DISCOUNT CORPORATION.

By S. F. Wilson,  
Its Vice-President.

WINTER & MAGUIRE,  
Proctors for Intervening Libelant.

United States of America,  
District of Oregon,—ss.

I, S. F. Wilson, being first duly sworn, upon oath depose and say, that I am the vice-president of the Bankers Discount Corporation, a corporation, the intervening libelants, herein, and I make this verification for and upon its behalf as the vice-president of said corporation, and that the seal hereto affixed



is the corporate seal of said corporation and is duly affixed by authority of said corporation; I have read the foregoing libel in intervention and know the contents thereof and that the matters stated in the foregoing libel in intervention, so far as they are therein stated as of my own knowledge, are true and so far as they are therein stated as of information derived from others I believe them to be true.

S. F. WILSON.

Subscribed and sworn to before me, a notary public, this 14th day of December, A. D. 1921.

[Seal]

HAZEL M. BRUNS,

Notary Public for the State of Oregon.

My commission expires Sept. 3, 1922. [32]

**Exhibit "A."****STATEMENT OF COST OF STEAMSHIP  
"EGERIA."**

Hull, engines, boilers and miscellaneous material		
from Emergency Fleet Corporation		\$147,747.96
210,480 B. M. Fir @ \$30.00 per M	9471.60	
4,800 " " Iron Bark & Oak @		
120.00 per M	576.00	
34—7" Knees @ 6.00 each	204.00	
14—8" " @ 7.00 "	98.00	
2—10" " @ 9.00 "	18.00	
1250 Treenails @ .08¢ each	100.00	
1300 White Pine Plugs @ 15.00		
per M	19.50	
800 White Pine Wedges @ 20.00		
per M	16.00	
		<hr/>
		\$10503.10
Iron, hardware, valves, paint and miscellaneous material from Coast		
Shipbuilding Co.'s yard	7500.00	18,003.10
<hr/>		
Miscellaneous material, accident insurance and miscellaneous direct expense		121,475.22
Direct labor on hull		55,555.11
Direct labor installation		52,899.18
Expenses subsequent to building		3,176.42
		<hr/>
		\$398,856.99
Credit by cash		350,000.00
		<hr/>
		\$ 48,856.99

Filed December 15, 1921. G. H. Marsh, Clerk.

AND AFTERWARDS, to wit, on the 21st day of March, 1922, there was duly filed in said court, an answer of libelant to the libel in intervention of the Bankers Discount Corporation, in words and figures as follows, to wit: [34]

In the District Court of the United States for the District of Oregon.

IN ADMIRALTY.

F. H. RANSOM, Trustee,

Libelant,

vs.

The Steamship "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Riggings, Tackle, Apparel and Furniture.

THE BANKERS DISCOUNT CORPORATION,  
a Corporation,

Intervening Libelant.

**Answer of F. H. Ransom, Trustee, Libelant, to Libel in Intervention of the Bankers Discount Corporation, a Corporation, Intervening Libelant.**

Comes now F. H. Ransom, Trustee, and for his answer to the libel in intervention of the Bankers Discount Corporation, a corporation, intervening libelant:

I.

Admits the allegations contained in Paragraph I of the libel in intervention of the Bankers Discount Corporation, a corporation, intervening libelant.

## II.

Alleges that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph II of the libel in intervention of the Bankers Discount Corporation, a corporation, and therefore denies the same and the whole thereof.

## III.

Admits the allegations contained in Paragraphs III and IV of the libel in intervention of the Bankers Discount Corporation, a corporation.

## IV.

Denies each and every allegation contained in Paragraph [35] V of the libel in intervention of the Bankers Discount Corporation, a corporation, except as is hereinafter expressly and definitely set forth, alleged and admitted.

## V.

Alleges that he has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations contained in Paragraph VI of the libel in intervention of the Bankers Discount Corporation, a corporation, and therefore denies the same and the whole thereof.

## VI.

Denies each and every allegation contained in Paragraph VII of the libel in intervention of the Bankers Discount Corporation, a corporation, and the whole thereof.

VII.

Denies each and every allegation contained in Paragraph VIII of the libel in intervention of the Bankers Discount Corporation, a corporation, and the whole thereof, save and except that the libellant F. H. Ransom, Trustee, admits that the ship "Egeria" is now in the port of Portland within the District of Oregon in the custody of the marshal of the United States for the District of Oregon, and within the jurisdiction of this court.

For a further and separate answer and defense to the libel in intervention of the intervening libellant, The Bankers Discount Corporation, a corporation, libellant F. H. Ransom, Trustee, alleges:

I.

That the ship "Egeria" is a vessel of the United States, known as a steam screw of 2360 gross tons of the approximate length of 266.6 feet and 46.1 feet beam, which vessel is duly [36] registered in the American port of Portland, Oregon, and which vessel is now on the maritime waters of the United States in the port of Portland, Oregon, and within the jurisdiction of this court and in the custody of the United States Marshal of the District of Oregon, by virtue of process of this Court issued herein upon the libel of F. H. Ransom, Trustee.

II.

That the ship "Egeria" is owned by the parties and in the interests as in this paragraph set forth:



Coast Shipbuilding Company 39/100, H. B. Ainsworth 1/100, J. C. Ainsworth 1/100, Boston Packing Company 1/100, Loren A. Bowman 1/100, C. R. Brinkley 1/200, Sophia Batterson, Trustee 2/100, Retta Bishop Clarkson 1/350, Columbia Wire and Iron Works, 1/100, Eastern and Western Lumber Co. 7/100, Edward Ehrman 1/100, J. K. Gill Co. 1/100, Gillen & Chambers Co. 2/100, Carrie A. Hollbrook 1/140, H. James 1/100, James B. Kerr 31/700, M. L. Kline Co. 1/100, L. A. Lewis 1/100, Gus Kuhn 1/100, Meier & Frank Co. 1/100, Olds, Wortman & King 1/100, Oregon Brass Works 1/200, Overmire Steel Construction Co. 8/100, Jaeger Brothers 1/100, David Dahm 1/100, C. A. Park 1/100, Portland Marine Supply Co. 2/100, A. H. Harding 1/200, R. M. Tuttle 1/200, Rasmussen & Co. 1/100, Roberts Bros. 1/100, A. B. & L. M. Scott 1/100, Ben Selling 1/100, C. E. S. Wood, 1/100, Paul C. Bates 1/100, G. W. Herron 1/100, L. B. Menefee 12/140, all of Portland, Oregon, and Bird Rose 1/100, of Eugene, Oregon, who are the sole and only owners thereof.

### III.

That heretofore and on or about the — day of —, 1920, the Coast Shipbuilding Company was a corporation organized and existing under and by virtue of the Laws of the State of Oregon, and engaged in building ships at Portland in Multnomah County, [37] Oregon.

### IV.

That on or about the — day of —, 1920, in Portland, Oregon, and within the jurisdiction of

this court, the owners of said ship "Egeria" being the same persons enumerated and set forth in paragraph II herein, purchased said ship "Egeria" her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture, from said Coast Shipbuilding Company for the sum of \$350,000.00, and fully and completely paid said Coast Shipbuilding Company therefor.

### V.

That thereafter said Coast Shipbuilding Company asserted and alleged that it had and possessed a claim against the owners of said ship in the sum of \$25,000.00 for material, machinery and labor furnished and performed upon said ship, but which claim in said sum of \$25,000.00 the said Coast Shipbuilding Company expressly waived as a claim or lien against said ship, her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture and by said waiver of said claim against said ship induced and persuaded the divers and sundry owners of said ship to purchase the interests therein so purchased and now owned by them as set forth in Paragraph II hereof, and that by reason of said waiver and said representations so made by said Coast Shipbuilding Company, the libellant, the Bankers Discount Corporation, a corporation, should be and is estopped from asserting any claim against said ship, her masts, bowsprit, boats, anchors, cables, chains, rigging, tackle, apparel and furniture by reason of said claim.

For a second further and separate answer and defense [38] to the libel in intervention of the

intervening libellant, The Bankers Discount Corporation, a corporation, libellant F. H. Ransom, Trustee.

### I.

Realleges all of the allegations contained in Paragraphs I to V inclusive of the first, further and separate answer and defense herein with the same force and effect as if fully set forth in words herein.

### II.

That heretofore and on the — day of March, 1921, a meeting was held in the city of Portland of all of the owners of the ship "Egeria," at which meeting the managing owner of said ship "Egeria," to wit: the Coast Shipbuilding Company, a corporation, was present and participated. That at said meeting it was determined by a majority of the owners, both in number and in amount, of said ship, to borrow money in the sum of \$35,000.00 for the purpose of paying certain obligations of said ship and it was then and there represented to the owners of said ship at said meeting by the managing owner, the Coast Shipbuilding Company, that if Libellant, F. H. Ransom, Trustee, would furnish and advance to and for the benefit of said ship, her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture, the sum of \$35,000.00, that it, the said Coast Shipbuilding Company, would waive any and all claims by it made or asserted against said ship, her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture, on account of the sum of \$25,000.00 by it, the said

Coast Shipbuilding Company, alleged to have been expended upon said ship, her masts, bowsprit, boats, anchor, cables, chains, [39] rigging, tackle, apparel and furniture, and that if he, the said F. H. Ransom, Trustee, would advance and furnish said sum of \$35,000.00 that it, the said Coast Shipbuilding Company, would and it did expressly waive any and all claims against said ship by reason of its said claim for \$25,000.00 alleged by it to have been expended for and on behalf of said ship, her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture.

### III.

That pursuant to the express representations of said Coast Shipbuilding Company, a corporation, that it would and did waive any and all claims against said ship "Egeria," her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and furniture, in the event that he the said F. H. Ransom, Trustee, would loan and advance to and on behalf of said ship said sum of \$35,000.00, the said Libellant, F. H. Ransom, Trustee, did so loan and advance to and on behalf of said ship said sum of \$35,000.00 as is alleged in the libel herein of Libellant F. H. Ransom, Trustee, and said ship has had the use and benefit of said money so loaned and advanced by him, said Libellant F. H. Ransom, Trustee.

### IV.

That said F. H. Ransom, Trustee, so loaned and advanced said sum of \$35,000.00 to said ship, her owners and managing owners, as is alleged in his



libel herein, being induced thereto and relying upon the said representations and express promises and agreements of it, the said Coast Shipbuilding Company, a corporation, that it did and would waive any and all claims by it had or asserted against said ship "Egeria," her masts, bowsprit, boats, anchor, cables, chains, rigging, tackle, apparel and [40] furniture, on account of said pretended claim of said Coast Shipbuilding Company in the sum of \$25,000.00, and particularly should said Coast Shipbuilding Company be and it is estopped from alleging that its said pretended claim in the sum of \$25,000.00 or any other sum is prior to or superior to or equal to the claim of said F. H. Ransom, Trustee, in the sum of \$35,000.00 as is set forth in his petition herein.

WHEREFORE, F. H. Ransom, Trustee, prays that the libel in intervention of the Bankers Discount Corporation, a corporation, be dismissed and that the Bankers Discount Corporation, a corporation, take nothing herein and that he, the said Libellant, F. H. Ransom, Trustee, have the relief by him prayed for in his libel herein.

JOSEPH, HANEY & LITTLEFIELD,

Proctors for Libellant F. H. Ransom, Trustee.

United States of America,  
State of Oregon,  
County of Multnomah,—ss.

I, F. H. Ransom, being first duly sworn, depose and say that I am libellant and Trustee in the above-



entitled —; and that the foregoing answer is true as I verily believe.

F. H. RANSOM,  
Trustee.

Subscribed and sworn to before me this 9th day of March, 1922.

[Seal] B. E. HANEY,  
Notary Public for the State of Oregon.

My commission expires Sept. 7, 1924. [41]

State of Oregon,  
County of Multnomah,—ss.

Due service of the within answer is hereby accepted in Multnomah County, Oregon, this 20th day of March, 1922, by receiving a copy thereof, duly certified to as such by B. E. Haney, attorney for answering libellant.

WINTER & MAGUIRE,  
By W. G. S.,  
Attorneys for Intervening Libellant.

Filed March 21, 1922. G. H. Marsh, Clerk. [42]

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AND AFTERWARDS, to wit, on the 18th day of May, 1922, there was duly filed in said Court, a reply by Bankers Discount Corporation, intervenor, to answer of libellant, in words and figures as follows, to wit: [43]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

F. H. RANSOM, Trustee,

Libellant,

vs.

The Steamship "EGERIA," Her Masts, Bowsprit,  
Boats, Anchors, Cables, Riggings, Tackle, Ap-  
parel and Furniture.

THE BANKERS DISCOUNT CORPORATION, a  
Corporation,

Intervening Libellant.

**Reply to Answer of Libellant.**

Comes now the Bankers Discount Corporation  
and for reply to the further and separate answer  
and defense of the libellant admits, denies and  
alleges as follows:

I.

Admits each and every allegation of paragraphs  
I, II and III.

II.

Denies each and every allegation of Paragraphs  
IV and V.

And for reply to the second, further and sep-  
arate answer and defense admits, denies and al-  
leges as follows:

I.

Realleges each and every of the admissions,  
denials and allegations of its first reply.

II.

Denies each and every allegation of Paragraph II.

III.

Denies each and every allegation of Paragraph III.

IV.

Denies each and every allegation of Paragraph IV. [44]

WHEREFORE having fully replied this intervening defendant prays that he may have relief prayed for in its intervening libel.

WINTER & MAGUIRE,

Proctors for Bankers Disc. Corporation.

State of Oregon,

County of Multnomah,—ss.

I, S. F. Wilson, being first duly sworn, depose and say that I am the Vice-president of the Bankers Discount Corporation, the intervening libellant in the above-entitled —; and that the foregoing reply is true as I verily believe.

S. F. WILSON.

Subscribed and sworn to before me this 18th day of May, 1922.

[Notarial Seal]

G. F. FABER,

Notary Public for the State of Oregon.

My commission expires July 20, 1923.

State of Oregon,

County of Multnomah,—ss.

Due service of the within reply is hereby accepted in Multnomah County, Oregon, this 18th day

of May, 1922, by receiving a copy thereof, duly certified to as such by Robert F. Maguire, attorney for intervening libellant.

B. E. HANEY,  
Of Attorneys for Libellant.

Filed May 18, 1922, in open Court. G. H. Marsh,  
Clerk. [45]

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AND AFTERWARDS, to wit, on the 5th day of  
September, 1922, there was duly filed in said  
Court, an opinion in words and figures as fol-  
lows, to wit: [46]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY—No. 8865.

In the Matter of the Ship "EGERIA," Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.  
F. H. RANSOM, Trustee, Libellant.

September 5, 1922.

JOSEPH, HANEY & LITTLEFIELD for Libellant  
F. H. Ransom, and for Intervening Libellant  
J. V. MASON.

WINTER & MAGUIRE for Intervening Libellant  
Bankers Discount Corporation.

C. D. CHRISTIANSON for Intervening Libellant  
United Sheet Metal Works.

WOLVERTON, District Judge.—This is a libel  
instituted by F. H. Ransom, Trustee, against the

American Vessel "Egeria," her masts, bowsprit, etc., for the foreclosure of a mortgage given and executed by the Coast Shipbuilding Company, as managing owner of the vessel and for and in behalf of the owners thereof, to secure the payment of the sum of \$35,000, and interest thereon from date at the rate of ten per cent per annum, evidenced by a promissory note, also given and executed by the Shipbuilding Company in like capacity; and for recovery of the further sum of \$2010.26, as insurance money paid by libellant in pursuance of the stipulations of the mortgage. A first lien is claimed for both the mortgage and insurance money advanced.

Several parties have intervened, who also claim liens on the ship, namely, J. V. Mason, Bankers Discount Corporation, and United Sheet Metal Works. Mason claims a lien in one item of \$6,653.86, arising from certain advances made by the master of the ship, consisting of wages of officers and crew and repair bills for work done on the ship while on a voyage to San Pedro; the claims therefor having been assigned to intervener; another item of \$856.13, comprising divers accounts accruing to the Port of Portland, Columbia River pilots and others, which have also [47] been assigned to intervener; and a third item of \$645.51 for moneys advanced in behalf of the ship for wharfage, towage, lighterage, and supplies, with the knowledge and consent of the managing owner.

The United Sheet Metal Works claims a lien, in a balance of \$328.72, for certain construction work and repairs done and made upon the ship



at the instance of the Shipbuilding Company, the managing owner, which lien is alleged to be superior to that of Ransom, Trustee.

The Bankers Discount Corporation, intervener, claims a first lien on the ship for labor, machinery and materials necessary for building, repairing, fitting, furnishing, and equipping the ship, furnished by the Coast Shipbuilding Company under contract with the owners of the ship, in a balance of \$48,856.99, with interest at six per cent from the time of furnishing the materials and doing the work, which claim has been assigned to the intervener.

The chief controversy in the case is touching whether Ransom, Trustee, has a lien on the ship superior to that of the Bankers Discount Corporation. This depends upon whether the Coast Shipbuilding Company, the assignor of the Bankers Discount Corporation, waived its priority right in favor of Ransom, Trustee, when the note and mortgage were given and executed to him.

The testimony relating to the subject is somewhat lengthy, and it is unnecessary to follow it. Suffice it to say that I have given it careful study, and there is left in my mind no doubt that the Coast Shipbuilding Company, as managing owner of the ship, deliberately waived its lien in favor of Ransom's mortgage. Indeed, the money would not have been advanced and the mortgage accepted without the waiver of the prior lien of the Shipbuilding [48] Company. The libellant Ransom, Trustee, is therefore entitled to the foreclosure of his mortgage, with a lien on the vessel prior to that of the

intervener Bankers Discount Corporation. So also is he entitled to recovery, with like superior lien, of the money advanced in payment of insurance, and a reasonable attorney's fee for foreclosure of the mortgage. The court finds:

First. That the "Egeria" is indebted to F. H. Ransom, Trustee, libellant, in the sum of \$35,000, with interest thereon from March 1, 1921, at the rate of ten per cent per annum, aggregating \$40,298.65; in the further sum of \$850, for premiums on insurance advanced, with interest thereon at the rate of ten per cent per annum from November 17, 1921, aggregating \$918.30; and in the further sum of \$2500, which the Court fixes as a reasonable attorney's fee for foreclosing libellant's mortgage.

Second. That the "Egeria" is indebted to J. V. Mason, intervener, in the sum of \$6,653.86, with interest thereon from October 18, 1921, at the rate of six per cent per annum, aggregating \$7,006.51; the further sum of \$645.42, with interest thereon from November 20, 1921, at the rate of six per cent per annum, aggregating \$676.18; and the further sum of \$845.58, with interest thereon from December 12, 1921, at the rate of six per cent per annum, aggregating \$882.79; aggregating in all the sum of \$8,565.48.

Third. That the "Egeria" is indebted to the United Sheet Metal Works in the sum of \$328.72, with interest thereon at the rate of six per cent per annum from October 1, 1920, aggregating \$367.34.

Fourth. That the "Egeria" is indebted to the Bankers Discount [49] Corporation in the sum

of \$48,856.99, with interest thereon from March 1, 1921, at the rate of six per cent per annum, aggregating \$53,286.70.

The decree of the Court will be that the "Egeria" be sold, and that the proceeds thereof be applied:

1. To the payment of the costs and disbursements attending the libel.

2. To the payment of intervening libelant. Mason's demand.

3. To the payment of libelant's demand, including attorney's fee allowed.

4. To the payment of intervening libelant United Sheet Metal Works' demand.

5. To the payment of the demand of the intervening libelant Bankers Discount Corporation.

Filed September 5, 1922. G. H. Marsh, Clerk.  
[50]

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AND AFTERWARDS, to wit, on the 7th day of October, 1922, there was duly filed in said Court, objections to form of proposed decree, in words and figures as follows, to wit: [51]

In the District Court of the United States for the District of Oregon.

In the Matter of the S/S "EGERIA," Her Furniture, Apparel, etc.

**Exceptions to Decree and Petition for Rehearing.**

Comes now the Bankers Discount Corporation and files its exceptions to the decree proposed in this cause and prays for rehearing in the cause,

upon the ground and for the reason that there is manifest error in the Court's decision in holding that the intervenor Mason has any maritime lien against said ship and in holding that the Coast Shipbuilding Company waived its maritime lien against said ship, and in holding that D. W. Green, Secretary of the corporation, was authorized by the corporation to waive the corporation lien upon the ship and in refusing to hold that the Bankers Discount Corporation had a first and paramount lien upon said ship, its furniture, apparel, etc.

WINTER & MAGUIRE,

Proctors for Bankers Discount Corporation.

State of Oregon,

County of Multnomah,—ss.

Due service of the within and foregoing exceptions to decree and petition for rehearing is hereby admitted in Portland, Oregon, this 7th day of October, 1922.

JOSEPH, HANEY & LITTLEFIELD,

Attorneys for Libelants.

Filed October 7, 1922. G. H. Marsh, Clerk. [52]

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AND AFTERWARDS, to wit, on Saturday, the 7th day of October, 1922, the same being the 83d judicial day of the regular July term of said Court. Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [53]



In the District Court of the United States for the  
District of Oregon.

No. A-8865.

In the Matter of the Ship "EGERIA," Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.

F. H. RANSOM, Trustee,

Libelant,

and

J. V. MASON, BANKERS DISCOUNT CORPO-  
RATION, and UNITED SHEET METAL  
WORKS, a Corporation,

Intervening Libelants,

and

COAST SHIPBUILDING COMPANY, a Corpora-  
tion.

**Minutes of Court—October 7, 1922—Order Over-  
ruling Objections to Decree.**

Now, at this day this cause comes on to be heard on the exceptions of the Bankers Discount Corporation, a corporation, intervening libelant herein, to the form of the decree, and its petition for rehearing, libelant appearing by Mr. Bert E. Haney, of counsel, and intervening libelant Bankers Discount Corporation by Mr. Robert F. Maguire, of counsel. And the Court, having heard the arguments of counsel, and being fully advised in the premises, upon consideration thereof



IT IS ORDERED that said exceptions be and they are hereby overruled, and that said petition be and the same is hereby denied. [54]

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AND AFTERWARDS, to wit, on Saturday, the 7th day of October, 1922, the same being the 83d judicial day of the regular July term of said Court. Present, the Honorable CHARLES E. WOLVERTON, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [55]

In the District Court of the United States for the District of Oregon.

IN ADMIRALTY.

In the Matter of the Ship "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture.

F. H. RANSOM, Trustee,

Libellant,

and

J. V. MASON, BANKERS DISCOUNT CORPORATION, a Corporation, and UNITED SHEET METAL WORKS, a Corporation,  
Intervening Libellants,  
and

COAST SHIPBUILDING COMPANY, a Corporation.

**Final Decree.**

This cause comes on for hearing, upon the motion of libellant, F. H. Ransom, for a decree herein, and

IT APPEARING to the Court, from an inspection of the records hereof, that the United States Marshal for the District of Oregon has returned on the process issued in the above-entitled cause that he has attached the said ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, and has given due notice to all persons claiming the same that this Court would, on the —— day of December, 1921, proceed to the trial and condemnation of said vessel, her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, should not claim be interposed for the same, and notice having been given and made for and to all persons interested in said vessel, her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, to appear and interpose their claims; and

IT APPEARING that there has been filed in this Court [56] certain libels and petitions of intervention in which liens are claimed against said vessel, her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, to wit: the petitions in intervention of J. V. Mason, Bankers Discount Corporation, a corporation, and United Sheet Metal Works, a corporation, and the answer of Coast Shipbuilding Company;

And this matter having heretofore come on for hearing before me, the undersigned, a Judge of

the above-entitled court, on the 9th day of May, 1922, libellant, F. H. Ransom, Trustee, appearing personally and by Joseph, Haney & Littlefield, his proctors, intervening libellant, United Sheet Metal Works, appearing personally, and Carl D. Christianson, its proctor, intervening libellant, Bankers Discount Corporation, appearing personally and by Winters & Maguire, its proctors, and Coast Shipbuilding Company appearing personally and by Winters & Maguire, its proctors, and this cause having been heard upon the pleadings herein in reference to the libel of libellant, F. H. Ransom, Trustee, and the answer of Coast Shipbuilding Company filed thereto, and upon the intervening libels filed by J. V. Mason and by United Sheet Metal Works, and the Court having considered the evidence and arguments submitted by the various parties and proctors herein, and now being fully advised:

IT IS ORDERED, ADJUDGED AND DECREED that the ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, be sold to answer the prayer of the libels and petitions herein filed, and that *venditioni exponas* issue accordingly, and that said vessel, her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, be sold at public sale for cash by the United States Marshal of the District of Oregon at the Morrison Street entrance [57] of the United States Court House (old Postoffice Building) in the city of Portland, Oregon, located on the south side of Morrison

Street, between Fifth and Sixth Streets, therein, after publishing notice of said sale once a week for two consecutive weeks in a newspaper of general circulation published daily in the city of Portland, Multnomah County, Oregon, and that the proceeds of said sale be paid by the Marshal into the registry of this Court for distribution herein;

AND IT IS FURTHER ORDERED AND DECREED that the following claims against said vessel, her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, are hereby ordered and decreed to be liens against said vessel and the proceeds of said sale in the amounts and in the order of priority herein set forth, that is to say:

First. Intervening libellant J. V. Mason be and he is hereby ordered and decreed to be entitled to a lien against said ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, in the sum of \$8,565.48, together with his costs incurred herein taxed at \$—;

Second. That libellant F. H. Ransom, Trustee, be and he is hereby ordered and decreed to be entitled to a lien against said Ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, in the sum of \$43,716.95, together with his costs and disbursements herein taxed at \$—;

Third. That intervening libellant, United Sheet Metal Works be and it is hereby ordered and decreed to be entitled to a lien against said Ship



"Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, in the sum of \$367.34, together with its costs and disbursements herein [58] taxed at \$—;

Fourth. That intervening libellant, Bankers Discount Corporation, be and it is hereby ordered and decreed to be entitled to a lien against said ship "Egeria," her masts, bowsprit, anchors, cables, rigging, tackle, apparel and furniture, in the sum of \$53,286.70, together with its costs and disbursements herein taxed at \$—.

AND IT IS FURTHER ORDERED AND DECREED that the following claims against said ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, shall be paid out of the proceeds of said sale in the amounts hereinafter set forth, and in the order of priority hereinafter set out, together with costs therein to be duly taxed herein:

First. To the United States Marshal for the District of Oregon as the costs of said sale the sum of \$—;

Second. To intervening libellant, J. V. Mason, the sum of \$8,565.48, together with his costs herein taxed at \$—;

Third. To libellant, F. H. Ransom, Trustee, the sum of \$43,716.95, together with his costs herein taxed at \$—;

Fourth. To intervening libellant, United Sheet Metal Works, the sum of \$367.34, together with its costs herein taxed at \$—;



Fifth. To intervening libellant, Bankers Discount Corporation, the sum of \$53,286.70, together with its costs herein taxed at \$—;

AND IT IS FURTHER ORDERED AND DECREED that after the payment of said sums to the parties herein named and in the order hereinabove named the balance of the proceeds of said sale remaining in the registry of this court be distributed according to the further order of this Court. [59]

AND IT IS FURTHER ORDERED AND DECREED that any claimant or claimants listed in this decree may bid and become the purchaser upon the sale of said ship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, to be made pursuant hereto, and if such claimant or claimants shall become the purchaser or purchasers, such claimant or claimants shall be entitled to apply, as an offset against the purchase price bid, his or their claim or claims to the extent to which such claimant or claimants would have been entitled to receive as the result of said sale, and share the dividend on the purchase price paid; provided, however, that such purchaser shall pay in cash a sufficient amount to provide for the Marshal's fees, Clerk's fees, expenses of sale and any preferred claims that may exist.

Dated at Portland, Oregon, this 7th day of October, 1922.

CHAS. E. WOLVERTON,  
District Judge.

Bert E. Haney left a copy with me this 16th of September, 1922.

ROBT. F. MAGUIRE.

Filed October 7, 1922. G. H. Marsh, Clerk. [60]

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AND AFTERWARDS, to wit, on the 6th day of April, 1923, there was duly filed in this Court, a notice of Appeal in words and figures as follows, to wit: [61]

In the District Court of the United States for the District of Oregon.

IN ADMIRALTY.

In the Matter of the Ship "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture,

F. H. RANSOM, Trustee,

Libellant,

and

J. V. MASON, BANKERS DISCOUNT CORPORATION, a Corporation, and UNITED SHEET METAL WORKS, a Corporation,  
Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Corporation.

**Notice of Appeal.**

To the Steamship "Egeria," her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture and F. H. Ransom, Trustee, and Messrs Joseph, Haney & Littlefield, proctors for said libellant and respondent, and J. V. Mason and Messrs Joseph, Haney & Littlefield, proctors for said intervening libellant and respondent, and United Sheet Metal Works, a corporation, and Carl D. Christianson, proctor for said intervening libellant and respondent, and to the Clerk of the United States District Court:

Please take notice that the intervening libellant Bankers Discount Corporation and the Coast Shipbuilding Company hereby appeal from the final decree made and entered herein on the 7th day of October, 1922, to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in and for said Circuit at the city of San Francisco in the State of California.

Dated at Portland, Oregon, April 6th, 1923.

WINTER & MAGUIRE,

By W. H. MAGUIRE,

One of Proctors for Intervening Libellant Bankers Discount Corporation and Coast Shipbuilding Company. [62]

State of Oregon,

County of Multnomah,—ss.

Due and legal service of the within notice of appeal is hereby accepted in Multnomah County, this 6th day of April, by receiving a copy thereof duly

certified to as such by W. H. Maguire, or proctors for intervening libellant and appellant Bankers Discount Corporation and Coast Shipbuilding Company.

JOSEPH, HANEY & LITTLEFIELD,

By E. V. L.,

Proctors for the Libellant F. H. Ransom.

JOSEPH, HANEY & LITTLEFIELD,

By E. V. L.,

Proctors for Intervening Libellant J. V. Mason.

C. D. CHRISTIANSON,

Proctor for Intervening Libellant United Sheet Metal Works.

Filed April 6, 1923. G. H. Marsh, Clerk. [63]

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AND AFTERWARDS, to wit, on the 11th day of July, 1923, there was duly filed in said Court, an assignment of errors, in words and figures as follows, to wit: [64]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

In the Matter of the Ship "EGERIA," her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.

F. H. RANSOM, Trustee,

Libellant,

and

J. V. MASON, BANKERS DISCOUNT COR-  
PORATION, a Corporation, and UNITED  
SHEET METAL WORKS, a Corporation,

Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Cor-  
poration.

**Assignments of Error on Behalf of the Appellant.**

Comes now the appellant, the intervening libel-  
lant Bankers Discount Corporation, and assigns as  
error to this court the following:

I.

That the District Court erred in this: that the  
libellant offered to prove the conversation between  
F. H. Ransom and Donald Green respecting the  
priority of the libellant's mortgage, and the appel-  
lant objected thereto on the ground that there was  
no foundation laid for their admission either as  
binding upon the Coast Shipbuilding Company or



as binding upon the Bankers Discount Corporation. The matter of the disposition of the rights of a corporation, the sale or waiver of its property, are matters that necessarily must be acted upon by the corporation's board of directors, and it must be first shown that the person making the statement was an officer who had authority, and that the authority was broad enough to permit him to undertake the act claimed against him; that the officers of an Oregon corporation have only such rights to bind the corporation as are given them by the by-laws or by the acts of the board of directors. Whereupon the Court [65] overruled the objection and permitted the testimony as follows:

A. It has been stated here that the Steamer "Egeria" and owners was not a corporation, but a partnership, as it were, in the Steamer "Egeria"; and on that management, that assumption of management Mr. Green has made positive statements that this money that I was to act as trustee for was to have first claim before anything else on this vessel. In fact, indirectly, without being personally a stockholder, I advanced \$2,500 myself.

COURT. Whom did you say Mr. Green represented?

A. The partnership owners of the Steamer "Egeria."

COURT. He does not represent, then, the Coast Shipbuilding Company?

A. He was representing both the Coast Shipbuilding Company as Secretary and as Managing Owner of the Steamer "Egeria."

COURT.—In that capacity he was acting for the copartnership?

A. I would assume that he was acting for the copartnership.

COURT.—Very well.

A. At one conversation in the United States National Bank with Mr. J. C. Ainsworth, when I myself solicited, in conjunction with Mr. Green, Mr. Ainsworth's support for some money to apply on this mortgage, I was advised then and there that there would be no lien prior to the money so advanced; and it was somewhat of a surprise to me when I was advised that there was any other claim that had taken precedence, or was assumed to take precedence over this mortgage which I held as trustee for those that had advanced money amounting to something like \$35,000,—\$35,000.

COURT.—The mortgage had not been given at that time?

A. The mortgage had not been given at that time. When the money was finally secured, then the mortgage was given me, and a memorandum of each individual advance sent to the mortgagees, of whom I am trustee.

## II.

The Court erred in this: That the libellant F. H. Ransom having offered to prove that Donald Green had stated that the Coast Shipbuilding Company would not appear with any claim in advance of the mortgage and that the mortgage would have priority over that claim, the respondent objected thereto upon the same grounds set [66] out in

assignment No. 1; whereupon the Court overruled the objection and admitted the testimony as follows:

Q. What, if anything, did Mr. Green say concerning the claims of the Coast Shipbuilding Company?

Mr. MAGUIRE.—Same objection, Your Honor, as I heretofore urged.

Objection overruled. Exception allowed.

A. I don't remember just what the statement was, but there was an intimation that the vessel had cost the Shipbuilding Company more than the \$350,000, but that was not at that time a matter of record, and that it would not appear with any claim in advance of the mortgage; the mortgage would have priority over that.

### III.

The Court erred in this that the libellant Ransom offered to prove that at said time and place Mr. Green purported to speak for the Coast Shipbuilding Company with regard to such waiver of its claim in favor of the mortgage; the respondent objected thereto on the ground that it calls for a conclusion of the witness, and that it is leading. Whereupon the Court overruled the objection and admitted the testimony as follows;

Q. Did Mr. Green purport to speak for the Shipbuilding Company then?

A. The conversation was very general, and there was a great deal of discussion there, and those that were present at that meeting were assured by Mr. Green that whatever money they advanced would have priority over any other claim.

## IV.

That the Court erred in this that the libellant offered to prove that Donald Green at various times and places prior to the execution of the mortgage had assured the stockholders of the ship who should participate in advancing money upon the libellant's mortgage that said mortgage would be a first lien and that the Coast Shipbuilding Company would waive its claim of lien and all [67] claims of priority over said mortgage, and that there were no other liens or claims against it. By agreement of Court and counsel it was stipulated that the counsel's objection to Mr. Green's authority to bind either the intervening libellant or the Coast Shipbuilding Company as stated in assignment of error No. 1 should go to all the testimony of this kind, and that it should not be necessary to interrupt the proceedings by specific objections to each question asked of the witness upon that subject and note an exception to the Court's ruling thereon, and thereupon the Court overruled the counsel's objections and allowed an exception, and the witness testified in accordance with said offer as appears in the testimony, which testimony is too voluminous to be set out herein, but which by reference is made a part hereof.

## V.

The Court erred in this that libellant offered to prove that one of the shareholders, Paul C. Bates, had received a letter dated February 25th, 1921, marked Libellant's Exhibit 5. The appellant objected thereto that there is nothing in the letter



binding the Coast Shipbuilding Company or the intervening libellant Bankers Discount Corporation. Whereupon the Court overruled the objection and admitted Libellant's Exhibit 5.

VI.

The Court erred in this that the libellant having offered to prove that J. P. Rasmussen has put money into the mortgage relying upon the representation of Donald Green that the mortgage would be a first lien upon the boat. The appellant objected thereto on the ground that it was not material to any issue in the case. The Court overruled the objection and admitted the testimony as follows:

"I certainly believed that that was the case. If I did not know that it would be a first lien I would never have put a dollar into it. I would rather have lost what I put in before." [68]

VII.

The Court erred in this that the libellant having offered in evidence as intervening libellant Mason's Exhibit No. 7 a receipt alleged to have been given by the master of the Steamship "Egeria" October, 1921, to Jas. V. Mason, as trustee for the mortgagees of the vessel of \$6,600.00 with interest at the rate of 8% per annum, payable quarterly from date, the above sum advanced on the exclusive credit of the said Steamship "Egeria" to her master, and the appellant objecting thereto upon the ground that it is incompetent, irrelevant and immaterial to any issue of the case. Whereupon the Court overruled



the objection and admitted said Exhibit No. 7 in evidence.

### VIII.

That the Court erred in this that the appellant having moved to strike out the intervening libellant Mason's Exhibit No. 7 on the ground that it had not been properly proven because the document has been witnessed, and a document witnessed can only be proven by the subscribing witness. Whereupon the Court overruled said motion and further permitted the witness to testify over the objection of counsel that he saw the master sign the receipt before the witness handed him the money.

### IX.

The Court erred in this that the intervening libellant Jas. V. Mason having offered to prove that he had advanced the sums of \$651.50, \$845.58, and \$264.39 for pilotage, wages of men, captain's wages, dock charges, pilotage up the Columbia river, cleaning boilers, taking down and stowing topping gear, oiling the engines, arrangements for towage to permanent berth and rental of permanent berth, and the appellant objected thereto upon the ground that it was not within the issues of the case, irrelevant and immaterial and not constituting items of maritime lien. Whereupon [69] the Court overruled the objection and permitted the testimony.

### X.

The Court erred in this that the libellant offered in evidence and offered to prove intervening libellant's Exhibits Nos. 8 to 17 inclusive, and appellant objected thereto upon the ground that the same

were not proper items of maritime lien and that no proper foundation had been laid. The Court thereupon overruled the objection and admitted said exhibits.

### XI.

The Court erred in this that the libellant having offered in evidence intervening libellant J. V. Mason's Exhibit No. 18, and the testimony of J. V. Mason with regard thereto the appellant objected to said exhibit and said testimony on the ground that no foundation had been laid for their admission, and that they and each of them are not lienable items, and particularly that they are not maritime liens.

### XII.

The Court erred in this that the libellant having offered in evidence intervening libellant Mason's Exhibit 19 and offered to prove that he had advanced said sums, the appellant objected thereto upon the same grounds as set forth in error No. XI, and thereupon the Court overruled the objection and admitted the testimony and exhibit.

### XIII.

That the Court erred in this in overruling the appellant's motion to dismiss the intervening libellant J. V. Mason upon the ground and for the reason that there is no authority of J. V. Mason to make the payments or incur the expenditures set forth in his libel, and that the items which he sets out in his libel are lienable and do not constitute maritime liens, and are without the jurisdiction of the Court to enforce. [70]

## XIV.

The Court erred in this in overruling appellant's motion to strike from the record all testimony and each and every part thereof offered on behalf of the libellant J. V. Mason upon the ground that there has been no foundation laid, and particularly that intervening libellant Mason's Exhibit 7 has not been proved.

## XV.

The Court erred in this in overruling the motion of the appellant to dismiss the libel of F. H. Ransom as trustee upon the ground and for the reason that it is an attempt on the part of the owners of the ship to create a lien in themselves as against themselves and against their ship, and that their proper proceeding is not in admiralty, but is for the dissolution of the partnership existing between them, and for an accounting.

WINTER and MAGUIRE,

Proctors for Bankers Discount Corporation.

State of Oregon,

County of Multnomah,—ss.

Due service of the within assignments of error on behalf of the appellant is hereby accepted in Multnomah County, Oregon, this 11th day of July, 1923, by receiving a copy thereof, duly certified to as such by Robert F. Maguire, Proctor for appellant.

JOSEPH, HANEY & LITTLEFIELD, and

JOHN C. VEATCH,

Proctor for Libellant and Intervening Libellant  
J. V. Mason.

Filed July 11, 1923. G. H. Marsh, Clerk. [71]

AND AFTERWARDS, to wit, on the 11th day of July, 1923, there was duly filed in said Court, the evidence introduced at the trial of the cause, in words and figures as follows, to wit: [72]

In the District Court of the United States for the District of Oregon.

In the Matter of the Ship "EGERIA," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture,

F. H. RANSOM, Trustee,

Libellant,

and

J. V. MASON, BANKERS DISCOUNT CORPORATION, a Corporation, and UNITED SHEET METAL WORKS, a Corporation,

Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Corporation.

**Testimony of F. H. Ransom, for Libellant.**

F. H. RANSOM, being called as a witness on behalf of the Libellant, and being first duly sworn, testified as follows:

"I am the manager of the Eastern & Western Lumber Company, and am the F. H. Ransom, Trustee, mentioned in the libel. I hold a note executed by the Ship through her managing owners; I personally was not an owner in the ship, but the East-



(Testimony of F. H. Ransom.)

ern & Western Lumber Company; the matter of putting a mortgage upon the ship was brought about by the following conditions: The "Egeria" had made a somewhat unsuccessful and very unprofitable trip to Australia, and it became necessary to make alterations so that she could be used in a trade that was more in keeping with her type of vessel, and the Coast Shipbuilding Company, the managing owners, decided that they could make certain changes and pay up certain bills, and for that purpose would require not to exceed \$35,000.00. By request I accepted the trusteeship for the potential future mortgagees, who should participate in the loan. I accepted the [73] trust with the full understanding that I would assume no financial responsibility, and that those advancing money would have a first claim on the vessel. This understanding was had with Mr. Green, manager and secretary of the Coast Shipbuilding Company."

"Q. Instead of stating what the understanding was, as nearly as you can, tell the Court what conversations you had with Donald Green respecting this mortgage, with reference to the priority of the mortgage. If you can give the time and place, do so. If you cannot, tell the effect of the conversation, as best you can."

"A. Well, I cannot remember verbatim the conversation, but there were various conversations, and one statement was—"

Mr. MAGUIRE.—"Just a moment, Mr. Ransom. We would object to conversations had with Mr. Green, on the ground that there is no foundation



laid for their admission, either as binding upon the Coast Shipbuilding Company, or as binding upon the Bankers Discount Corporation. The matter of the disposition or of the rights of a corporation, the sale or waiver of its property, are matters that necessarily must be acted upon by the corporation's board of directors. I take it that upon the question of the authority to bind a corporation, it must be first shown that the person was an officer who had authority, and that that authority was broad enough to permit him to undertake the act claimed against it. The officers of an Oregon corporation have only such rights to bind the corporation as are given them by the by-laws or by the acts of the Board of Directors."

(Argument.)

Mr. HANEY.—I think, your Honor, this evidence is admissible. It is competent. It is only incidental to the final act [74] that occurred at a later date. You will keep in mind we will show by the record here the Coast Shipbuilding Company has sold this vessel to these various people, had warranted the title to it as being free from encumbrances, undertaken to warrant them against any loss or damage. Then came the necessity of getting this money. The Coast Shipbuilding Company acted entirely through Donald Green. The Coast Shipbuilding Company acted through Donald Green in signing the bill of sale; it later acted through him in signing the note and mortgage. He was the moving spirit in the matter, in so far as the owners knew. Now, it seems to me that it is a material

(Testimony of F. H. Ransom.)

thing that the Court should have the view of what it was that induced Mr. Ransom to put money into this thing; and if he was induced by Green, who held himself out as being the active party in the Coast Shipbuilding Company, certainly the Coast Shipbuilding Company cannot go to people and induce them to put up money on the representation that they will waive any prior rights to the lien created to repay that money, and then having induced them to do that by reason of such representation, turn around and assert some kind of a lien or claim that it is ahead of it. I don't think this is an absolute necessity, but I do think it is material."

COURT.—"You claim that this is matter that originated with Green?

Mr. HANEY.—Yes.

COURT.—I will overrule the objection, and permit the testimony.

Mr. MAGUIRE.—I would like to save an exception.

A. It has been stated here that the steamer "Egeria" and owners was not a corporation, but a partnership. Mr. Green represented that partnership as it were, in the steamer 'Egeria'; [75] and on that management, that assumption of management, Mr. Greene had made positive statements that this money that I was to act as trustee for was to have first claim before anything else on this vessel. In fact, indirectly, without being personally a stockholder, I advanced \$2500.00 myself."

COURT.—Whom did you say Mr. Green represented?

(Testimony of F. H. Ransom.)

A. The partnership owners of the steamer "Egeria."

COURT.—He does not represent, then the Coast Shipbuilding Company?

A. He was representing both the Coast Shipbuilding Company as secretary and as managing owner of the steamer "Egeria."

COURT.—In that capacity he was acting for the copartnership?

A. I would assume that he was acting for the copartnership.

COURT.—Very well.

A. At one conversation in the United States National Bank with Mr. J. C. Ainsworth, when I myself solicited, in conjunction with Mr. Green, Mr. Ainsworth's support for some money to apply on this mortgage, I was advised then and there that there would be no lien prior to the money so advanced; and it was somewhat of a surprise to me when I was advised that there was any other claim that had taken precedence, or was assumed to take precedence over this mortgage, which I held as trustee for those that had advanced money amounting to something like \$35,000.00."

COURT.—The mortgage had not been given at that time?

A. The mortgage had not been given at that time? When the money was finally secured, then the mortgage was given me, and a memorandum of each individual advance sent to the mortgagees, of whom I am trustee.

(Testimony of F. H. Ransom.)

I was at a meeting in the Chamber of Commerce Building [76] on or about February 24, 1921, at which Mr. Green was present.

Q. What, if anything, did Mr. Green say concerning the claims of the Coast Shipbuilding Company?

Mr. MAGUIRE.—Same objection, Your Honor, as I heretofore urged.

(Objection overruled. Exception allowed.)

A. I don't remember just what the statement was, but there was an intimation that the vessel had cost the Shipbuilding Company more than the \$350,000.00, but that was not at that time a matter of record, and that it would not appear with any claim in advance of the mortgage; the mortgage would have priority over that.

Q. Did Mr. Green purport to speak for the Shipbuilding Company then?

Mr. MAGUIRE.—I object to that. That calls for a conclusion of the witness. The witness may testify what Mr. Green said. And there is the additional objection that it is leading.

(Objection overruled. Exception allowed.)

A. The conversation was very general, and there was a great deal of discussion there, and those that were present at that meeting were assured by Mr. Green that whatever money they advanced would have priority over any other claim.

Q. When was the money actually advanced with reference to the time you had this meeting in the Chamber of Commerce?



(Testimony of F. H. Ransom.)

A. Well, the money was secured at various times; came largely through the mail, after solicitation at this meeting, and agreements that were made at this meeting.

Q. The point is, before or after that meeting?

A. After that meeting.

Q. What induced you to put the money up?

A. My personal amount? [77]

Q. Yes, your own.

A. With the assertion that there was absolutely no financial risk, and that the money was needed to complete the \$35,000.00 that was required at that time to make the necessary repairs and alterations in the vessel.

Q. What, if anything, did Mr. Green say at that meeting with reference to the attitude or the future action of the Coast Shipbuilding Company with respect to any claim that it might have?

Mr. MAGUIRE.—May it be understood that my objection to Mr. Green's authority to bind either the intervening libellant or the Coast Shipbuilding Company, goes to all this testimony, so I will not have to interrupt the witness?

COURT.—Very well. That may be understood.

A. Mr. Green did not bring any detailed claim or specify any amount, as I remember it, intimate any serious claim of the Coast Shipbuilding Company.

Q. He didn't specify the amount, but he did mention the fact that they had a claim?

A. He mentioned that the vessel had cost them more than this amount, and that there was a claim.



(Testimony of F. H. Ransom.)

Q. What did he say, with respect to your mortgage, that the Coast Shipbuilding Company would do about that claim?

A. That the claim would be secondary to the mortgage.

Q. Do you know Mr. Fred Wilson of the Bankers Discount Corporation?      A. I do.

Q. Have you had any conversation with him, prior to the time you filed this libel against the ship "Egeria" with respect to the claim of the mortgage? [78]

A. I have never had one word of discussion with Mr. Wilson regarding the steamer "Egeria" or the Coast Shipbuilding Company.

Q. Has any part of that mortgage been repaid?

A. It has not.

Q. What about the interest?

A. The interest has defaulted, nothing being paid.

Q. What, if anything, did you do with respect to keeping the steamer "Egeria" insured after the time of making the mortgage?

A. I don't remember just the date, but I found out that the insurance had lapsed and I notified the committee that was looking after the "Egeria" that there was no insurance on it at that time.

Q. Did you advance money to pay the insurance?

A. I did not personally, no.

Q. Do you know what one of the committee, or whether they did advance any money to pay the insurance out of your fund?

(Testimony of F. H. Ransom.)

A. I merely acted as trustee, and not looking after the management of the vessel after that money was invested, I paid very little attention to those details; but I believe some insurance money was advanced to bring the vessel from San Pedro to Portland.

Q. What one of the committee looked after that?

A. Mr. Bates.

Q. Paul Bates?      A. Yes.

Mr. HANEY.—You admit the execution of the note and mortgage?

Mr. MAGUIRE.—Have you copies of them here?

Mr. HANEY.—Yes, I have set them out.

Mr. MAGUIRE.—Is it made a part of your libel?

Mr. HANEY.—Yes.

Mr. MAGUIRE.—We admit the execution of the two instruments, the promissory note of \$35,000.00 and the mortgage, copies of which [79] are made a part of the libel. We make no concession, however, as to the legal effect of those instruments.

On cross-examination the witness testified as follows:

“So far as I am able to say the persons or firms participating in the loan are those named in intervening Libellant’s Exhibit ‘A,’ which was prepared under my direction.”

Q. I notice to the left there is a column “Subscriber” and then a column “Subscription.” The subscription referred to the amount in the ship, subscription in the ship, partnership subscription?

A. The original subscription.

Q. The original interest in the ship?      A. Yes.

(Testimony of F. H. Ransom.)

Q. And then there is a column headed "Pro Rata Share, \$42,500.00." That refers to what matter?

A. That is the third column?

Q. The second column.

A. You will notice that, that is, each one subscribed in proportion to their stock, the amount in proportion to \$42,500.00.

Q. But they didn't all come in according to their amount of stock, and the total amount raised was \$35,000.00 instead of \$42,500.00? A. Yes.

Q. These various amounts that were apportioned in the second column, headed "Pro rata shares \$42,500," were arrived at by taking the amount by the proportion which their amount of shares in the ship bore to the amount that you desired to raise?

A. Yes.

Q. The third column, "Mortgage Subscription," is the amount which was actually paid in, and which you claim is covered [80] by your note and mortgage? A. Yes.

Q. I want to ask you if it is not a fact that what you were informed by Mr. Green was that this mortgage when properly executed and registered, would, under the 1920 shipping laws, become the first mortgage upon the ship under the provisions of that act?

A. I don't remember that Mr. Green ever mentioned any of the legal phrases, or shipping acts, etc. It was simply the plain, blunt statement that this mortgage had priority over anything else against the ship up to that time.

(Testimony of F. H. Ransom.)

Q. You knew the mortgage was being given under the shipping act, did you not?

A. I knew that it would be recorded in the Custom House; but I am very unfamiliar with maritime acts or laws.

**Testimony of Paul C. Bates, for Libellant.**

PAUL C. BATES, being called as a witness on behalf of the libellant, and being first duly sworn, testified as follows:

"I am in the insurance business, and was one of the owners of the Ship 'Egeria' during the years 1920 and 1921. I first learned of the necessity of raising money for the 'Egeria' about the time the ship returned to Portland from Australia, and it was necessary to raise money to cover the deficit representing operating expenses and to obviate certain defects revealed as a result of the trip which must be done before the ship was put in commission again. This loss was called to my attention in the latter part of December, 1920. The operating loss was due to the long time it took to load her and to discharge her in Australia, and the loss of time in Australia in getting her cargo coaled for return to Honolulu. The delays and expenses of operating totalled a considerable deficit, but how much I do not remember.

"I obtained my information as to the necessity of raising [81] money for the 'Egeria' in the latter part of December, 1920, from Mr. Green, representing the Coast Shipbuilding Company, then the managing owners of the vessel, and the owners of



(Testimony of Paul C. Bates.)

a substantial portion of the boat. I was solicited by and gave to Mr. Green in the name of the Coast Shipbuilding Company a power of attorney to represent my interests in the boat. The following is a copy of the document, being marked Libellant's Exhibit 1."

**Libellant's Exhibit No. 1.**

"Portland, Oregon, December 22, 1920.

Coast Shipbuilding Company,  
Portland, Oregon.

Gentlemen:

The undersigned, part owner of the steam schooner "Egeria" and her appurtenances, etcetera, hereby appoints you, Coast Shipbuilding Company, Managing Owner thereof, with all the usual powers of a managing owner, and also with power to insure said vessel, her freights, and liabilities, and the ownership and liabilities of the undersigned in the premises in such manner and to such extent as in your judgment may seem best, and also to defend the said vessel and/or the undersigned, in any action or claims against her, and to sue or defend, collect, compromise, and settle all claims or demands for or against the vessel and/or the undersigned as part owner thereof; and also to repair, equip, supply, renew, and alter the vessel and all parts thereof, and to man and document and operate and salvage said vessel, and generally to charter, manage and control the vessel and her business; and also to negotiate and secure any and all loans or banking accommodations in your judgment necessary, and to



secure the same by mortgage or pledge of the vessel, or in such other manner as may be required.

For your services as Managing Owner, you are to receive a commission of two and one-half per cent ( $2\frac{1}{2}\%$ ) on the gross receipts of the vessel. Any advances made by you for the account of the owner of the vessel shall bear interest at the going rate until repaid, and shall be a lien upon the vessel and her earnings."

"I received from the Coast Shipbuilding Company, Libellant's Exhibit 2, which is as follows:

**Libellant's Exhibit No. 2.**

**'COAST SHIPBUILDING COMPANY,**  
914 Lewis Building,  
Portland, Oregon. [82]

December 23, 1920.

To the Subscribers Str. "Egeria":

We are enclosing two copies of agreement appointing Coast Shipbuilding Company Managing Owners. Please sign one copy and return, retaining the other copy for your information.

To facilitate matters, we have asked Mr. F. H. Ransom and Mr. Paul C. Bates to act in an advisory position in the conduct of the vessel's affairs.

On account of the fact that the "Egeria" is on return voyage and arrangements have to be made for future operations, we trust you will sign and return the enclosed at once.

Very truly yours,  
**COAST SHIPBUILDING COMPANY.'**

(Testimony of Paul C. Bates.)

I had a conversation with Mr. Don. Green, who I understood was one of the officers and directors of the Coast Shipbuilding Company, as to the necessity of raising money to take care of the deficit and make some changes in the boat. Mr. Green said the boat was about to arrive, that there would be liens filed on account of labor and other expenses as the returns from the charters were not sufficient to cover the actual operations incurred on the trip to Australia and back. Mr. Green said that the stockholders would have to raise the money or they would have to borrow it, and Mr. Green made some arrangements temporarily to take care of the labor accounts, through what source I don't recall, but it was only temporary and he was quite anxious either that the stockholders take some interest in it and he thought I could possibly be of some assistance to him in raising the money. I call them stockholders because in maritime matters I look upon a stockholder the same as you would use a shareholder in other enterprises. What I mean is individual owners in the boat. I suggested to Mr. Green that the Coast Shipbuilding Company should immediately call a meeting of all the shareholders in the vessel [83] and place the financial condition of the vessel before the shareholders for their action rather than to deal with one or two like myself, whose interest in the boat was only nominal. It is my understanding that he didn't care to do that at the time for some reason or other and endeavored to raise the money in other ways. It finally resulted

(Testimony of Paul C. Bates.)

in his asking me to accompany him and Mr. Ransom to the United States National Bank with the idea of negotiating a loan from the bank for from \$30,000.00 to \$35,000.00, which he thought would be sufficient. Mr. Ransom and I accompanied Mr. Green to the United States National Bank and had a talk with Mr. John Ainsworth, the president, who a couple of days later advised us that his committee did not consider the loan desirable. As an inducement we represented that we would give him a mortgage on the boat which would be a first lien, and Mr. Green corroborated the offer. Our failure in that direction made it necessary to place the matter before the shareholders that they might take such action as was necessary to protect their interests. There was mailed to each shareholder of record a notice dated February 14th, 1921, executed by the Coast Shipbuilding Company, Managing Owners, by D. W. Green, and also by F. H. Ransom, Paul C. Bates, James B. Kerr, Leslie M. Scott and C. C. Overmire, Messrs. Scott, Ransom, Overmire, etc., representing themselves as shareholders. Libellant's Exhibit 3 is a copy of this notice, and is as follows: [84]

### **Libellant's Exhibit No. 3.**

February 14, 1921.

To the Shareholders SS. "Egeria":

The undersigned have made a general investigation of the results of the round trip of the vessel "Egeria" to Australia via Honolulu and it is going to require a total of \$35,000 additional in the way of

capital or loan to make good the deficit caused by the operation of the vessel together with the providing of sufficient funds to take care of the remaining balance of unpaid annual insurance and to pay for such alterations and repairs as are essential to correct some of the faults of the vessel which have become apparent from operation and to place her in the best condition possible for operation in the coastwise trade.

The managing owner and one or two of the stockholders have endeavored for the past three weeks to negotiate a loan secured by a mortgage on the vessel and while this would have been possible six months ago, by reason of existing financial conditions, it is impossible to arrange at this time. Therefore, our only alternative is to call upon the stockholders for an assessment of 15%. We will appreciate it if you will make remittance promptly in order that we may complete needed alterations and close charters for business at attractive rates now offered us in the coastwise trade.

While we are at this time fully impressed with the fact that it was a mistake to send this vessel on her maiden trip on a long off-shore voyage to Australia, yet the charter was arranged at a time when rates were high although no allowance was made for possible costly delays in waiting for cargo, underloading, defects, or handicaps involved in changing a Ferris hull like the "Egeria" and converting her into a lumber carrying type of vessel. The results have demonstrated fully that the arrangement of 14 oil tanks in the hold have not accomplished what was anticipated, namely, the placing of sufficient



weight in the form of fuel oil low enough down in the hold to enable the vessel to carry a large deck load in addition to underdeck load and at the same time provide ample oil storage for long off-shore trips. The results have proven that the arrangement of tanks not only failed to accomplish the proper ballasting but that it operated to delay the rapid loading of the vessel. In fact, it took twice as much time both loading and discharging as would ordinarily be required by reason of limited space around hatches and general awkwardness.

On her outward trip she carried only 1,300,000 feet of lumber when she should have taken 1,600,000 under the charter at \$35.00 per thousand feet, and on the return trip she only loaded 1965 tons of coal when, under the charter, she should have taken 2300 tons at \$9.00 per ton, losing in round trip freight over \$13,000 under the charter and the loss of time in loading in the Columbia River together with loading and waiting for cargo in Australia amounted to an unnecessary delay of thirty days involving operating expenses of \$15,000.

The vessel on the other hand showed unusual qualities for steaming and seaworthiness; her fuel consumption being only 80 barrels a day which is as low as any vessel of her size of which we have knowledge.

With due consideration for this experience and the various defects enumerated, Captain McNaught of the Board of Marine Underwriters has recommended and approved of a plan whereby [85] we will take out eight of the fourteen steel tanks, four



on either side of the vessel forward, and also some of the tweendeck beams and place from 250 to 300 tons of ballast in the lowest part of the hold nearest the keelson. The effect of this alteration will be to place ballast in the lowest part of the vessel and lower the center of gravity sufficiently to enable us to load at least 600,000 feet on the deck and likewise give us capacity in the hold of approximately 1,000,000 feet and, what we consider more to the point, would enable the vessel to receive much quicker loading and discharge by reason of the increased room provided for storing away underdeck on account of removal of the tanks and beams referred to. The removal of tanks and loading of ballast will not take more than two weeks at the outside and will represent an aggregate expense of not to exceed \$5,000.00.

The vessel will retain six oil tanks holding over 2000 barrels of oil more than sufficient for coastwise trade or an occasional trip to Honolulu should rates prove attractive. She could also make the west coast of South America if the rates were attractive.

As some compensation for additional amount of capital which we are calling upon various stockholders to provide for, we would point out that the eight tanks removed cost \$5,000 a piece to install and they should be worth from \$12,000 to \$15,000 when salvaged which, of course, will take some time and will accrue to the benefit of the stockholders.

Summarizing the situation, after the improvements have been completed it is our opinion that this vessel should then be able to make reasonable

returns to the stockholders, having in mind that the coast rates to San Francisco from the Columbia River are now \$9.00 per thousand feet of lumber and \$10.50 to San Pedro, and at these rates, after allowing for even material reductions, should still enable the vessel to make a competitive showing with the best type of steam schooner operating in this trade. The reason for this observation is based entirely on the fact that the "Egeria's" fuel consumption is not greater than vessels carrying 1,000,000 to 1,200,000 feet of lumber and yet her loading capacity should not be less than 1,500,000 or 1,600,000 feet per trip. Her operating expenses, from the standpoint of crew and ship stores required, is not greater than vessels of 1,300,000 carrying capacity. Furthermore, notwithstanding a slack movement in coastwise business at the present time, which is characteristic of this season of the year, there is yet sufficient trade in sight and which has been offered to us to insure her continuous operation for several months to come.

Vessels now operating in the coastwise trade like the "Ryder Hanify" and the "Anne Hanify" and carrying 1,300,000 feet and burning 90 barrels of oil per day and which carry a crew similar in number to that of the "Egeria," are earning, even under present conditions, \$8,000 a month and have been doing this and better ever since the "Egeria" began loading in September and we see no reason why the "Egeria" with alterations completed, should not make attractive profits.

We urgently recommend your favorable consideration of our plan of financing the situation which confronts us, as otherwise the probabilities are the vessel will be libeled for small amounts and the expense and losses consequent thereto are so entirely out [86] of proportion to what our plan will accomplish that we can see no other alternative than to urge your immediate approval and will appreciate your prompt remittance. In view of your subscription being fully paid up this assessment will be considered as a first lien and will be so regarded and secured.

PCB:MW

COAST SHIPBUILDING COMPANY,

Managing Owners.

By D. W. Green.

Frank H. Ransom,

Leslie M. Scott,

Paul C. Bates,

C. C. Overmire,

James B. Kerr.

“I received Libellant’s Exhibit 4, a letter of February 22d, 1921, which is as follows:

**Libellant’s Exhibit No. 4.**

‘COAST SHIPBUILDING COMPANY,

Portland, Oregon.

February 22, 1921.

Shareholders SS. “Egeria”:

At the suggestion of several shareholders and due to the seriousness of the situation, we are calling a meeting of the shareholders of the SS. “Egeria”

(Testimony of Paul C. Bates.)

to be held in the Green Room of the Chamber of Commerce at 4 o'clock P. M. on Thursday, February 24th, 1921.

It is vitally important that you should attend.

Yours truly,

COAST SHIPBUILDING COMPANY,

Managing Owners.

By D. W. Green.'

Q. Mr. Bates, I hand you a letter dated February 25, 1921, and ask you what it is and where you got it?

A. This is a notice or a letter addressed on the stationery of the Coast Shipbuilding Company, directed to myself, and executed by the Coast Shipbuilding Company, Managing Owners, by D. W. Green, requesting me to remit check for \$1,000.00, which was my part.

Mr. HANEY.—I offer in evidence a letter of February 25th, 1921.

Mr. MAGUIRE.—We object to this. There is nothing in that letter binding the Coast Shipbuilding Company or binding the intervening libellant.  
[87]

Received and marked Libellant's Exhibit 5, and reading as follows:



(Testimony of Paul C. Bates.)

**Libellant's Exhibit No. 5.**

‘Portland, Oregon, February 25, 1921.

Mr. Paul C. Bates,

Yeon Building,

Portland, Oregon.

Dear Sir:

We will be pleased to receive your check for \$1,000.

As outlined a trustee will be appointed and a mortgage on the SS. “Egeria” will be executed in his favor. He, in turn, will execute to those advancing this money a trust agreement specifying that he holds the mortgage in trust and as security.

Insurance in the amount of \$35,000.00 will also be placed upon the vessel in favor of the trustee.

As this is urgent we would appreciate very much receiving your check by Monday, February 28.

Yours very truly,

COAST SHIPBUILDING COMPANY,

Managing Owners.

By D. W. Green.’

and I also received Libellant's Exhibit 6, asking me to remit \$1,000.00 as my subscription to the mortgage, and stating that F. H. Ransom had accepted the position of trustee of the mortgage on the “Egeria,” and that I forward my check payable to F. H. Ransom, Trustee, which I subsequently did. As far as I can recollect there were present at the meeting in the Chamber of Commerce on February 24th, 1921: Mr. Gill, Mr. Lewis, Mr. Duffy, Mr.



(Testimony of Paul C. Bates.)

Edward Ehrman, Mr. Park, Mr. Buck, Columbia Wire and Fence Works, Mr. Mason—Portland Marine Supply Company; Mr. Jaeger of Jaeger Bros., Jewelry; Mr. Walker representing Roberts Bros., Mr. Don Green, representing Coast Shipbuilding Company, Mr. Sherwood, also representing the Coast Shipbuilding Company, and several others. I understood that Mr. Sherwood was an officer of the Coast Shipbuilding Company, and I would [88] say that at least three-fourths or more of the owners of the vessel were represented in that meeting.

Mr. Green made a statement to the meeting in effect that on behalf of the Coast Shipbuilding Company he was making a report of the operations of the vessel, up to that time, and the deficit created, and that it would be necessary to raise money not only to cover the deficit, but to provide sufficient funds to make alterations which would insure the economical operation of the vessel in the future. He called attention to the efforts he had made in behalf of the Coast Shipbuilding Company to raise this money in other ways, but that he had found it impossible, and that he had called this meeting after consultation with certain of the stockholders for the purpose of laying the situation clearly before it, and he was open to suggestions and asked for general discussion. Several questions were asked, and finally Mr. Jaeger got on his feet and said: 'I don't see any reason why we can't raise this money among ourselves.' He said he was willing to put up \$1,000.00 provided the money raised would be secured

(Testimony of Paul C. Bates.)

by a first mortgage on the vessel. It is my memory that something over \$20,000.00 was subscribed by those present, and after the meeting adjourned Mr. Green expressed his encouragement at the possibility of raising \$30,000.00 or \$35,000.00 because of the general response that followed the suggestion of Mr. Jaeger, and those who followed him in the subscriptions. Mr. Green said it would be necessary to raise \$35,000.00. Mr. Green said there were no other liens other than those represented in this report. There were no other liens or claims outstanding against the vessel other than the deficit caused by the trip to Australia and return, and that those putting up this money would be secured by a first mortgage. There was general conversation as to the character of the alterations that would have to be made [89] but nothing more was said that I now think of with regard to the priority of the mortgage."

Thereupon the intervening Libellant, United Sheet Metal Works called—

**Testimony of John M. Joyce, for Intervening Libellant.**

JOHN M. JOYCE, who being first duly sworn, testified that he was the manager of the United Sheet Metal Works, an Oregon Corporation, which had made claim for \$328.72 for materials furnished upon the "Egeria"; that it was at the time lying at the dock of the Coast Shipbuilding Company in Portland; that the "Egeria" had been

(Testimony of John M. Joyce.)

built by the Wilson Shipbuilding Company at Astoria, and the Emergency Fleet Corporation, who had had her built by the Wilson Shipbuilding Company, loaded her with miscellaneous materials and supplies and shipped those materials and supplies on the "Egeria" to their concentration yard at St. Johns, where she was unloaded and then turned over to the Coast Shipbuilding Company; that the United Sheet Metal Works furnished all the copper pipe for the ship after her voyage from Astoria to Portland.

**Testimony of Paul C. Bates, for Libellant  
(Recalled).**

PAUL C. BATES resumed the stand and thereupon testified that after March 1st, 1921, F. H. Ransom personally had paid \$850.00 for insurance on the ship.

On cross-examination the witness testified as follows:

"I knew of the operating loss of the 'Egeria' some time in September, 1920, prior to the letter of December 23d of that year. Mr. F. H. Ransom and I acted in an advisory position in the conduct of the vessel's affairs part of the time; we were consulted on some occasions, and on others we were not. I was perfectly willing to do what I could by suggestions, but I didn't feel that I cared to give my time without any qualifications to it. Mr. Ransom and I were consulted and advised the Coast Shipbuilding Company with regard to the financial con-

(Testimony of Paul C. Bates.)

ditions resulting [90] from the deficit caused by her operation. The meeting on February 24th, 1921, was in response to the notice of February 14th, 1921, and of February 22d, 1921, Libellant's Exhibits 3 and 4. Mr. Green at the meeting on February 24th made no mention of any claim of the Coast Shipbuilding Company, but I had already received a letter dated November 26th, 1920, which is as follows:

**'COAST SHIPBUILDING COMPANY.**

Portland, Oregon, November 26, 1920.

Mr. Paul Bates,

Portland, Oregon.

Dear Sir:

There is handed to you herewith a certificate of ownership, certified by the United States Collector of Internal Revenue, covering your 1/100 interest in the S. S. "Egeria."

The vessel is now in service under the management of the Columbia-Pacific Shipping Company as operating agents.

Due to various causes and on account of the determination to add certain items of equipment not originally specified, the cost of the vessel exceeded the original estimate by approximately \$25,000.00. It is impossible at this time to give exact amount, as we still have a few purchases in question with the Emergency Fleet Corporation.

In order that the payment of dividends to shareholders may not be delayed, the Coast Shipbuilding Company has undertaken to carry this amount with



(Testimony of Paul C. Bates.)

the other shareholders, and will cause one-half of all net earnings to be paid by way of dividends and the other half to be applied in payment of this excess.

Very truly yours,  
COAST SHIPBUILDING COMPANY,  
Managing Owners.  
By D. W. Green.'

My firm of McCargar, Bates & Lively brought action against the Coast Shipbuilding Company in July, 1920, for insurance premiums on the vessel, which was the time she went into commission, or at least that was the time she started to load in Astoria."

**Testimony of L. A. Lewis, for Libellant.**

L. A. LEWIS was called as a witness on behalf of the libellant and testified [91] as follows:

"I am connected with Allen & Lewis, and am personally a shareholder in the ship 'Egeria.' I was present and recall a meeting held in the Chamber of Commerce rooms in the City of Portland some time in February, 1921, with relation to the affairs of the 'Egeria.' Mr. Donald Green, a representative of the Coast Shipbuilding Company, was present. Mr. Green made a statement as to the condition of the ship, and said that the voyage and this or that had happened that had made it unprofitable. He also went into detail about the loading of the ship and the construction that they had put in the tanks, some of the pipe in the boat was a little too high,



(Testimony of L. A. Lewis.)

and by putting in a few hundred tons of ballast they would bring the weight of the ship down, and in that way could load I think an additional 1,500 feet or 1,500,000 feet of lumber, which would make quite a difference in carrying and return more income from freight. He told us that there was needed about \$35,000.00 to pay these pressing debts, and then he wanted some money to make these minor changes for the future benefit of the boat, and with that he thought the boat would be all right. He pointed out that the stockholders he thought would probably have to do it. That they (the Coast Shipbuilding Company) were large stockholders, but that they as stockholders could not put up their share of the \$35,000.00 on account of the situation they were in, and gave as his reason or excuse that they had this deficit in building the boat, but it was practically being not considered by them now, and on that basis he was appealing to the other stockholders. I thought I understood the situation so that there wasn't any hesitation on my part in subscribing for the shares as a stockholder to advance this \$35,000.00 on the understanding that there was going to be a mortgage on the boat to protect this immediate money that was advanced. [92] Mr. Green said in stating why the Coast Shipbuilding Company as a stockholder could not put up its *pro rata* that he was going to put aside this claim of the company against the boat and the mortgage would have the first preference."

Q. Mr. Green represented that because the Coast

(Testimony of L. A. Lewis.)

Shipbuilding Company had a claim against the boat they were unable to contribute toward the mortgage, but they would put that aside?

A. That was as an excuse, sort of explanation why they could not, on top of other conditions, that they were already in that much, and therefore they rightly could not be called upon; and then they didn't have it, I suppose; but that was a sort of general statement of explanation as to why the Coast Shipbuilding Company would not come through, or could not come through with their *pro rata* share. In other words, the proper way would have been for each shareholder to advance in proportion to its stockholdings, and that could not be done to start with. So then the stockholders who were there contributed the amount they saw fit, irrespective of the amounts of their ownership in the ship. For instance, I had one share, which was \$3,500.00, I think, so I subscribed \$1,000.00 on this \$35,000.00.

Q. But the representation made by Mr. Green was that the mortgage, if put on in accordance with his suggestion would be a first mortgage upon the boat, a first lien upon the boat?

A. There was no question or suggestion of any other way; no question about."

On cross-examination the witness testified:

"Mr. Green's mention of the claim of the Coast Shipbuilding Company at that meeting was in a casual way. In apologizing for the liability of the Coast Shipbuilding Company to take their *pro rata*

(Testimony of L. A. Lewis.)

he mentioned the fact that they had this claim in the [93] building of it, but that they were putting it aside at the time. I cannot quote anybody's language in a conversation where I had no idea I would have to remember accurately, because there was no question in my mind. Sometimes you remember a thing for a reason, and other times you understand perfectly but you cannot accurately state."

Q. Well, now, isn't it a matter of fact that what Mr. Green said was that the Coast Shipbuilding Company, by reason of the fact that it had had to advance out of its own funds this additional sum to complete the changes in the ship when it took the hull over from the Government, was unable to meet any part of this \$35,000.00?

A. As a stockholder, as he was asking the rest of us to do?

Q. Yes.      A. That was the reason, yes.

Q. They were in other words broke; they didn't have any available cash to make any contribution to this money that was necessary to rehabilitate the ship?

A. Yes, to that extent. The point was really that, having asked us to contribute to the boat and having told us that it would cost \$350,000.00 they were not saying much about this excess cost, because in a sense they had made a statement which they had not carried out; therefore he felt the responsibility enough in not pressing that claim at that time.

(Testimony of L. A. Lewis.)

Q. Not pressing that claim at that time. Now, I will ask you, Mr. Lewis, if it is not a fact that on or about the 26th day of November, 1920, you received from the Coast Shipbuilding Company, as managing owners of the ship, a letter substantially in words and figures the same as that addressed to Mr. Bates?

A. I presume I did. I couldn't recollect now. If I [94] could search, I probably just took it and put it away, filed it away.

Q. Would you mind reading that letter, Mr. Lewis?

A. This is a letter to Mr. Paul Bates.

Q. Yes, it may refresh your memory.

A. You mean read it to myself?

Q. Oh, yes. I don't mean to read it out loud. You received one similar to that, did you not?

A. I don't know whether I did or not. I probably did, yes. I could not say yes or no, now, because I paid no attention to it.

Q. I see. Well, now, I will ask you if it is not the fact that, as a shareholder in the ship, you executed, I suppose it would be really a marine power of attorney, there, to appoint this company as the managing owner?

A. I probably did, although I don't accurately recall now.

Mr. MAGUIRE.—Is there any question upon that, Mr. Haney?

Mr. HANEY.—No, there is not. As a matter of fact, all these people executed it.



(Testimony of L. A. Lewis.)

Q. Mr. Green appearing there at that meeting appeared there to make a report on behalf of the managing owner, did he not?

A. I presume he was there in behalf—yes, of course, because he had been managing owner, and he belonged to the company, but he was there really to ask the stockholders to help him out in the emergency of raising this money, because he owed money, or the ship owed money through their handling, and it had to be paid immediately. The purpose of it was to get this \$35,000.00 if possible from the stockholders—the shareholders.”

**Testimony of Edward Ehrman, for Libellant.**

EDWARD EHRMAN, being called as a witness on behalf of the libellant testified [95] as follows:

“I am a wholesale grocer—Mason-Ehrman & Company—and a shareholder in the ship ‘Egeria.’ I recall and attended a meeting held some time in the month of February, 1921, at the Chamber of Commerce wherein the affairs of the ship ‘Egeria’ were discussed. Mr. Donald Green addressed the meeting, and after explaining the condition of the ship he said the steel tanks in the boat must be removed to make more room for cargo space, and it would cost a considerable amount of money to take them out. I don’t remember how much. There were other conversations which I don’t recollect which resulted in most of those present agreeing to put up this amount of money; Mr. Green suggested the necessity of having this money to meet these



(Testimony of Edward Ehrman.)

obligations, to pay the boat's debts and to make some repairs. He said that the money so advanced would be a first lien upon the vessel, but I don't think he mentioned anything about its priority over any lien of the Coast Shipbuilding Company, but I put up more money on the assurance that it would be a first lien. I had no intention of putting up any money for assessments or anything else, but I felt safe in advancing that much more on the boat on the assurance that it would be secured by a first lien."

On cross-examination the witness testified:

"Mr. Green said nothing of the lien of the Coast Shipbuilding Company, and I understood that Mr. Green was in the meeting as representing the managing owners who had charge of the boat for all the shareholders."

### **Testimony of C. B. Duffy, for Libellant.**

C. B. DUFFY was called as a witness on behalf of the libellant, and testified as follows:

"I am the Secretary of the Eastern & Western Lumber Company, which corporation is the owner of shares in the ship '*Egeria*.' I have some acquaintance with the affairs of the ship since the [96] Eastern & Western Lumber Company became a shareholder, and am acquainted with Donald Green of the Coast Shipbuilding Company, and knew him prior to the meeting held in the Chamber of Commerce with reference to what should be done with the '*Egeria*.' In the office of the Eastern &

(Testimony of C. B. Duffy.)

Western Lumber Company in company with Mr. Ransom, Mr. Green stated that it was necessary to raise money to make certain changes in the vessel, and there was a deficit on account of the trip to Australia, and money had to be raised to provide the ship with necessary funds. Mr. Green assured Mr. Ransom and myself at that time that they were willing to waive any claims they had against the vessel, and if the different people would put up this money, it would be a first mortgage lien on the vessel. Afterwards at the meeting on February 24th in the Chamber of Commerce, at which I was present Mr. Green assured us that the proposed mortgage would be a first mortgage lien, and for that reason our company agreed to put in an additional \$5,000.00 on the mortgage with the understanding that it was a secured lien—a first lien—on the vessel prior to anything else that existed. Mr. Green said that they were willing if these people would put up the money to wait for their money and to take any amount that there might have been on the overage of this cost out of the earnings of the vessel, and that the mortgage would be a first lien; that the Eastern & Western Lumber Company put money into the mortgage on Mr. Green's representations."

On cross-examination the witness testified as follows:

"Mr. Ransom and myself were handling the matters as far as the Eastern & Western Lumber Company were concerned, and determined when Mr.

(Testimony of C. B. Duffy.)

Green approached us in our own office that we would put up an additional \$5,000.00, provided it was secured as a first mortgage lien. My understanding was that Mr. Green made those representations at the Chamber of Commerce meeting that they would wait [97] on any claim they had and take it out of the earnings of the vessel. They were glad to get us to put up this money so as to get the vessel in shape to go ahead. As I understood Mr. Green at the meeting he said that they were waiving their rights providing we put up this money. The original suggestion was that every shareholder put up his *pro rata* share of the amount necessary to take care of this, but he said that his people could not come through nor would, as I understood him, the Bankers Discount Corporation put up any more money, but if we would put up this money we would be given a first mortgage lien on the vessel. I don't know that Mr. Green stated at the meeting of February, 1921, that the Bankers Discount Corporation wouldn't put up any more money, but different times he assured me that they would not put up any more money when we asked them to come in with us. Mr. Green never told me that he was representing the Bankers Discount Corporation, but he did say that he had seen Mr. Wilson and they wouldn't put up any more money. I think it is probably true that the statement with regard to the Bankers Discount Corporation did not come up until later after the mortgage money was put up, but later on after this mortgage was

(Testimony of C. B. Duffy.)

placed on there there was an additional amount to be raised and we asked everybody to come in on the mortgage, which they, the Bankers Discount Corporation, would not do. I think the entire amount of the mortgage with the exception of \$3,500.00 was contributed before July, 1921. I think Mr. Green approached them to take a part of the mortgage. I don't know that to be a fact, but I believe that was what happened. I know that the Coast Shipbuilding Company was a corporation, and I know that back in 1920 they had a claim in excess of \$25,000.00 against the vessel, which was to be taken out of the excess earnings, and they sent us a letter to that effect. The shareholders who now hold a first lien prior to that of the Coast Shipbuilding Company, [98] which was the largest individual shareholder, never procured any written waiver or release from the Coast Shipbuilding Company."

**Testimony of J. P. Rasmussen, for Libellant.**

J. P. RASMUSSEN, being called as a witness on behalf of the libellant, was duly sworn, and testified as follows:

"I am in the paint and oil business, and am a shareholder in the ship 'Egeria.' I was present at a meeting in February, 1921, in the Chamber of Commerce with regard to the affairs of the 'Egeria.' I know Donald Green by sight. He was present at and addressed the meeting and said that he was unable to put up any money. For my part



(Testimony of J. P. Rasmussen.)

I understood that we would have a lien, there would be no prior lien, if we put up that money. Mr. Green stated that his company was unable to put up any money, but my recollection was he waived any prior rights. I don't believe Mr. Green was the man that made the proposition of giving a mortgage to secure the money advanced, but he discussed it. I believe it was generally understood from his statement that the mortgage would be a first lien on the boat. That was my understanding."

Q. Why did you put any money into the mortgage?

Mr. MAGUIRE.—Objected to as not material to any issue in this case.

Mr. HANEY.—What is not? My question?

Mr. MAGUIRE.—Yes.

Mr. HANEY.—I think it is. I asked the witness why he put money into the mortgage. That is objected to. Now, it seems to me we ought to be entitled to show that he put money in there relying upon the representation that the mortgage would be a first lien upon the boat.

COURT.—I think that may be answered.

Mr. MAGUIRE.—Your Honor will allow us an exception?

COURT.—Yes.

A. I certainly believed that that was the case. If I [99] did not know that it would be a first lien, I never would have put a dollar into it. I would rather lost what I had put in before."



(Testimony of J. P. Rasmussen.)

On cross-examination the witness testified as follows:

“From what Mr. Green said the Coast Shipbuilding Company could not raise any part of this \$35,000.00. I heard the testimony of Mr. Bates, Mr. Ehrman and Mr. Lewis to the effect that nothing was said at the meeting about the claim of the Coast Shipbuilding Company.

“Mr. Green made no mention of any claim and I didn't hear Mr. Green make any statement to that effect.”

### **Testimony of C. A. Parks, for Libellant.**

C. A. PARKS, being called as a witness on behalf of the libellant, and being first duly sworn, testified as follows:

“I am office manager of Mason-Ehrman Company, who are not owners in the ship ‘Egeria,’ but Mr. Ehrman, who is a member of the firm, is. I individually own one share in the ship, and was present at the meeting of the Chamber of Commerce in February, 1921, where the affairs of the ‘Egeria’ were discussed. I know Donald Green, who was there. Mr. Green made a rather lengthy statement, advising the people at the meeting that the boat was showing a deficit; that it needed a lot of repairs necessary for operation; that he had tried to negotiate loans through banking and financial interests in the city, but was unable to make any headway, and the meeting was called for the purpose of getting the shareholders to make up a fund sufficient to take care of the obligations against the boat of

(Testimony of C. A. Parks.)

approximately \$35,000.00. As I recollect his remarks he stated in order to get the people to subscribe that were at the meeting that whatever money was subscribed and put up would be considered a first lien on the boat covered by ample security, and there would be absolutely no doubt but what we would all get our money back. As a matter of fact it would be considered the first obligation of the [100] boat. Consequently, I think \$20,000 was subscribed. Later on after March 1st, 1921, Mr. Green came to me trying to make up the difference between \$20,000.00 and \$35,000.00. He stated that he had not received enough to make up this entire deficit, or fund that was necessary for the purpose mentioned at the meeting. I subscribed \$1,000.00 in the matter, and subsequently I raised that to \$5,000.00 simply on the assurance of Mr. Green that it would be absolutely protected by a first mortgage or guaranty that I would get my money back, otherwise I would not have put it in. There would be no reason for my putting money into it unless I was assured that I would get it back."

Upon cross-examination the witness testified:

"In due form I and the other shareholders of the Ship had constituted the Coast Shipbuilding Company our managing agents in the operation of the ship, and this meeting was called in accordance with two notices—one of February 22d, and the other of February 14th. The statement in the letter to the effect: 'Therefore our only alternative is to call upon the stockholders for an assessment of 15%'

(Testimony of George E. Walker.)

was for the purpose of raising this fund to make these changes and meet the deficit.”

**Testimony of George E. Walker, for Libellant.**

GEORGE E. WALKER, being called as a witness on behalf of the libellant, was first duly sworn, and testified as follows:

“I am in the drygoods business, and am an officer of the corporation of Roberts Bros., which was a shareholder in the ‘Egeria.’ I am the member of the corporation who gave attention to the affairs of the ‘Egeria.’ I know Donald Green, and was present at the meeting in the Green Room of the Chamber of Commerce in February, 1921, at which Mr. Green was present. Mr. Green represented that mortgage to be a first lien on the ship, and that there were no other outstanding liens at that time. My company contributed to the mortgage [101] upon the assurance that it was absolutely gilt-edged security, and was secured by a first mortgage on the boat. At the meeting on February 24th Mr. Green said that the Coast Shipbuilding Company had exceeded the cost of construction of the boat by some forty odd thousand dollars, I believe, but that they were content to wait for their claim until such time as they were able to collect it from the earnings of the ship. This was my recollection of his statement. That they were unable to participate in the mortgage because they held this claim because they were already in it to that extent, and could not afford to put up any more money, but that they would be willing to wait until the earnings of the

(Testimony of George E. Walker.)

boat warranted a collection of that account, Mr. Green stated that the mortgage would be a first lien."

Upon cross-examination the witness testified:

"I understood at the time of the meeting that there were some \$43,000.00 in an unsettled account supposed to be held by the Coast Shipbuilding Company. That this was mentioned at the meeting and Mr. Green advanced that as the reason why his company (the Coast Shipbuilding Company) could not participate in the mortgage or take any further share in the boat. I believe that the matter of the shareholders increasing their shares, taking additional shares, had been threshed out prior to the meeting. An assessment or call had been made upon the shareholders proposing an assessment of 15%, I think, but the response had not been very satisfactory—not sufficient to cover the liability incurred by the boat on its voyage to Australia and to cover the expense of making alterations in the hull to increase its carrying capacity. Ways and means had to be created to raise enough money to pay these liens, the loss and deficit incurred [102] by operation of the ship and to make these necessary changes. That was said to be about \$12,000.00 or \$15,000.00 loss in operating the boat, and \$25,000.00 to make the necessary changes in the hull. The effect of the proposal at the meeting was that the shareholders were creating a trustee or a committee to raise the money, and a mortgage as a first lien on the boat was considered the only way the



(Testimony of George E. Walker.)

money could be raised. A mortgage as a first lien, absolute guaranty, with a fair rate of interest as an investment on the ship was offered to anyone who might wish to take part of it. The advantage of the mortgage was discussed at the meeting, simply that it was a 10% investment that was absolutely gilt edged, a first lien on a boat said to be worth \$350,000. There was no discussion at the meeting as to the advantage the shareholders would have if they had this mortgage upon their own property, which would prevent any strangers from coming in there and making claims for bills that were incurred in subsequent operation of the ship. I didn't hear it discussed if it was."

**Testimony of Jas. V. Mason, for Libellant.**

JAS. V. MASON, being called as a witness on behalf of the libellant, was duly sworn, and testified as follows:

"I am in the shipping business, and my company or business name is the Portland Marine Supply Company, Oregon Stevedoring Company and Pacific Marine Construction & Repair Company. The Portland Marine Supply Company was the owner of shares in the ship 'Egeria.' I know Donald Green, and I had a conversation with him prior to the meeting at the Chamber of Commerce in February, 1921, in relation to raising money to take care of claims against the 'Egeria.' This conversation was in my office three days, or may be four days, before the meeting held in the Chamber of Commerce. I discussed with Mr. Green the claim



(Testimony of Jas. V. Mason.)

of the Coast [103] Shipbuilding Company. He didn't have very much to say for the simple reason that I did not consider that he had any claim. He told me it was something in connection with supplies or purchases from the Emergency Fleet Corporation, some rebates or something in connection with that; that they really weren't enabled to arrive at the real cost of the vessel. So I asked him, I says: 'What is the reason in connection with the Emergency Fleet Corporation, because they won't let you take anything back, so there should be no discrepancy or arrangement or agreement or rebate in connection with that, as far as the Emergency Fleet Corporation is concerned; so I don't see, if you have any claim why this thing couldn't have been fixed up quite a considerable time ago, because you cannot expect to have any claim against them as far as the vessel is concerned.' He discussed with me the necessity of raising money to take care of the 'Egeria,' and I told him I didn't think it practicable, because I didn't think the boat was worth it. He suggested that we raise the money through borrowing at the bank, and he asked me if I could do anything at my bank, which was the Northwestern National Bank. I told him I probably could if I agreed to indorse the note, I could get the money, but at the same time I didn't think it was feasible, because I didn't think we ever had the chance of getting our money back. He told me that the mortgage had a prior lien over the claim of the Coast Shipbuilding Company on the 'Egeria.' I was at the meeting in the Chamber of Commerce

(Testimony of Jas. V. Mason.)

and Mr. Green was there, and I had a meeting with Mr. Green about 15 minutes before the general meeting about the same matter, in which he asked me to give my support to his suggestions; that he had already spoken to Mr. Ransom and Mr. Duffy, and if I would agree on it, on account of my knowledge in the shipping business that [104] all the other gentlemen present would do exactly what I would do. H suggested that we would mortgage the boat for about \$30,000.00, and that we would try and subscribe the money and get it the best way we could. Why, I asked him, I says, "Of course, we will get a first lien on the boat?" "Absolutely." I says, "How about this \$25,000.00 you told me a couple of days ago with this Emergency Fleet Corporation?" "Well," he says, "you know very well," he says, "that you will have a first lien." "Well," I says, "we certainly will have, or else I won't get up and talk to these gentlemen and persuade them to put their money in."

"At the meeting I was sitting alongside Mr. Green, and before they elected someone as chairman of the meeting I asked Green again, "Now, I will put up a little money on this thing. I will put up \$2,000.00, providing one thing is understood between you and I, that what money I put up, and what money anybody else puts up is a first lien on the boat, and there's no other claims against it that take preference over this lien." He said "Absolutely," and we shook hands on it. As nearly as I can remember at the meeting Mr. Green said this would be a first lien on the ship, the money that was ad-

(Testimony of Jas. V. Mason.)

vanced, if we collected this money or if we raised this money. You understand that I put up \$2,000.00 there, and then he came to me two or three weeks afterwards and said he was short of money, and said "I want another \$1,000.00 from you." I says, "You understand what you told me before, that this is a first lien, no other lien." "All right." "Well," I says, "All right, I will pay \$1,000.00." Mr. Green told the assembled shareholders at that meeting that it would be necessary to raise \$30,000.00. I suggested that the money be secured by a mortgage on the boat, a first mortgage, [105] a first lien. I don't remember what Mr. Green told the shareholders about the priority of that mortgage, whether it was the first, second or otherwise, but I know what he told me when I was sitting alongside him when he got up to speak. The effect of what he said to the shareholders was this: That we had a prior lien, and that all other liens or obligations in connection with the 'Egeria,' they would forego that, for the simple reason that what liens they had they could not prove at any time, as I told him how impossible it would be to do, for the material supposed to be bought for this boat never had gone into the boat. As a matter of fact, some of the material that was bought for the 'Egeria' is now down in my store in the shipyard, that I bought myself."

COURT.—Did he tell that to the meeting?

A. He told me that, because I knew various little things in connection with the thing. That was the reason I asked these other gentlemen, it was on my

(Testimony of Jas. V. Mason.)

say-so, in my experience, I convinced them to put in this money, which I put up \$2,000.00, and I think there was one or two other gentlemen put up more than I did. I put up my money because I thought I would get it back, and I felt that it was secured beyond any other claims; there was no question about it, and I convinced the other gentlemen that were there, too. After the money was advanced on the mortgage and when the boat was in the harbor at San Pedro Mr. Green gave me the first information about the trouble there. It was prior to April 16th. It was in the neighborhood of October 10th or 12th. I made a trip to San Pedro. When I arrived there the 'Egeria' was libeled for the wages of the seamen, and the United States Marshal was in possession of the boat. The Master of the boat was Captain C. J. Swenson. I held a meeting in the attorney's [106] office and talked to the marshal, and he told me to go to Los Angeles to see the clerk. I advanced \$6,600.00 to the Master to release the ship, and obtained Intervening Libellant Mason's Exhibit 7, which was thereupon offered in evidence. The intervening libellant Bankers Discount Corporation objected that the exhibit was irrelevant, incompetent and immaterial to any issue in the case. The court overruled the objection, and allowed an exception, and Exhibit 7 was admitted, and reads as follows:

**Intervening Libellant Mason's Exhibit No. 7.**

"Whereas, the Steamship "Egeria" being in the Port of San Pedro, California, without funds with which to pay the wages of the mariners thereof,



port charges, etcetera, and the said vessel having been libeled for said mariners' wages and there were threatened and impending libels for other wages and charges against said vessel.

And Whereas the owners, having failed to provide the money with which to pay said wages and port charges, James V. Mason, as trustee for the mortgagee of said vessel has this date advanced to me the sum of \$6600.00 with interest at 8 per cent per annum, payable quarterly from this date, as master of said steamship for and on behalf of said ship, and for the payment of the wages, port charges, and for the further purpose of enabling said vessel to reach her home port of Portland, Oregon.

The above sum of money was advanced on the exclusive credit of the said steamship "Egeria," her engine, tackles, apparel, furniture, etc.

Dated San Pedro, California, October 18, 1921.

\$6600.00. Dollars only.

C. J. SWENSON,

Master of Steamship "Egeria."

J. E. BENN,

Witness."

COURT.—That was advanced on behalf of the trustee?

Mr. HANEY.—Yes, he says he advanced it for and on behalf of the trustee.

Mr. MAGUIRE.—I move to strike out this exhibit. I would like to enlarge my objection, your Honor, to the effect that this [107] has not been properly proven, and move that the exhibit be stricken.



(Testimony of Jas. V. Mason.)

COURT.—Why hasn't it been properly proven?

Mr. MAGUIRE.—Because under the statute, a document which has been witnessed can only be proven by the witness.

Mr. HANEY.—I would like to ask this witness a question about the witness on that. I don't know who that is.

Q. What is J. E. Benn, who purports to be a witness there?

A. He was a clerk in the attorney's office that drew it up.

Q. Were you present when that document was signed? A. Absolutely.

Mr. MAGUIRE.—Objected to as irrelevant and immaterial; an improper way of proving it.

COURT.—The objection is overruled. You took this receipt yourself?

A. In the attorney's office, yes, sir, from the captain.

COURT.—From the captain?

A. Before I advanced him the money to pay off his crew. He had the ship libeled.

COURT.—You saw the captain sign the receipt?

A. Absolutely, sir. I was right there—before I handed him the money.

COURT.—The Court will overrule the objection. (Exception allowed.)

“I directed the boat to leave San Pedro for Portland, and she left in 36 hours, and arrived in Portland on the 26th of October, 1921.”

Q. Now, after that time, what, if any money, did you [108] advance for that boat, for any other

(Testimony of Jas. V. Mason.)

purpose, and for what purpose did you advance money?

Mr. MAGUIRE.—Objected to, as not being within the issues of this case, and irrelevant and immaterial.

(Objection overruled. Exception allowed.)

A. I advanced this money for pilotage, completing payment of the wages of the men when they arrived in Portland, the captain's wages, the dock charges, the pilotage up the river. I also had the vessel—I had to get the boilers cleaned out, all the topping gear and everything else taken down and stowed away in the hold so it would not rot, the engines oiled down and put in shape for an indefinite period of laying the vessel up, so she would not deteriorate, and arrangements for tonnage to take the vessel up to her permanent berth where she is now.

Q. How much money did you advance for the purpose?

Mr. MAGUIRE.—My objection may run to all of this without the necessity of interrupting?

COURT.—Yes.

"I have receipts here for \$645.51 and \$845.58. You understand that if these obligations hadn't been taken care of there wouldn't be any vessel now to be having this trouble over. Intervening Libellant Mason's Exhibit 8 is the payroll for laying up the vessel for an indefinite period, oiling the engines, putting the ship in position to lay her up. At that time she was at St. Johns Terminal No. 3. The amount paid there was \$264.39.

(Testimony of Jas. V. Mason.)

“Intervening Libellant Mason’s Exhibit 9 for identification is \$15.05—lights on the ship at Astoria, where she went alongside of the dock and did not have any steam.

“Intervening Libellant Mason’s Exhibit 10 was for taking [109] off and on the pilot of the vessel when she came in. They have a flat charge of \$5.00 which every ship pays at the port. It was necessary to protect the vessel and enable it to come up to Portland to lay up.

“Intervening Libellant Mason’s Exhibit 11 is as follows: They had some fresh stores aboard the vessel, consisting of groceries, vegetables, laundry supplies, etc. I brought them up town and used them, and sold them, and credited the ship with that amount—meat and vegetables, otherwise, if I had left them there they would have been spoiled. Also the laundry I took to lock up, otherwise it would have been stolen off the vessel.

“Intervening Libellant Mason’s Exhibit 12 is for \$40.00, for telegrams sent by the Coast Shipbuilding Company and myself with instructions to the Captain at San Pedro as to what to do, while the vessel was in custody of the United States Marshal. They were for the benefit of the vessel.

“Intervening Libellant Mason’s Exhibit 13 were telegrams instructing the captain of the vessel what to do and that I was on my way down to release it. It was for the benefit of the boat and necessary.

“Intervening Libellant Mason’s Exhibit 14 was the same thing—telegrams to McCormick & Mc-

(Testimony of Jas. V. Mason.)

Pherson, Rinder & Cook and C. J. Hendry Company to advance money to enable the boat to proceed, which they did not do, and it was necessary for us to proceed to San Pedro for that purpose. These telegrams represented by Exhibit 14 were telegrams sent in an effort to avoid going to San Pedro to get the boat out of the possession of the United States Court where it was libeled.

"Intervening Libellant Mason's Exhibit 15 is a telegram for \$1,000.00 to the Captain to go ahead and advance the crew a [110] certain amount of money and make arrangements to enable the vessel to proceed as soon as the balance of the money was there. That was for the benefit of the boat so as not to delay it.

"Intervening Libellant Mason's Exhibit 16 is my expenses to San Pedro and return, in looking after the interests of the boat when I went down to get her relieved from the Court. The amount was \$317.65. I was away ten days.

"Intervening Libellant Mason's Exhibit 17 is \$1.50 tax which we had to pay when we borrowed \$7,500.00 from the United States National Bank. It was my personal note, and I am personally responsible, but I secured the signatures of some of the mortgagees to secure that money."

It was there discovered that the intervening libel of Jas. V. Mason was filed, but no order was taken and no bond put up and no answer filed, and it was then stipulated that the matter may be considered as having been filed with a bond and order taken, and



(Testimony of Jas. V. Mason.)

that the proctor for the Bankers Discount Corporation and Coast Shipbuilding Company may have a week to answer, and that the proctor for the Intervening Libellant Mason will file the bond and complete his record, and that the case would proceed as though the record had been completed on both sides.

“Q. Mr. Mason, with respect to the items aggregating \$856.13, I will ask you whether or not you advanced those items for and on behalf of the “Egeria,” and if so, in what sums, and for what purposes?

Mr. MAGUIRE.—Objected to as not being a proper item of maritime lien, and that no proper foundation has been laid.

COURT.—When you say on behalf of the “Egeria,” you mean on behalf of the Trustee?  
[111]

Mr. HANEY.—No, for the boat itself. This is money advanced by Mr. Mason after the boat was brought back to Portland, in attempting to take care of her and keep her from being ruined, and get her permanently docked, for which he has filed a libel.

COURT.—That is on the same basis as the \$6,000?

Mr. HANEY.—Yes, on the same basis, but not for the same things.

COURT.—I understand, but they come under the same class?

Mr. HANEY.—Yes.



(Testimony of Jas. V. Mason.)

COURT.—They were not advanced in behalf of the Trustee?

Mr. HANEY.—No, sir. They were advanced at his request and by his knowledge, but they were advanced by Mr. Mason.

COURT.—That receipt would indicate that that was advanced on behalf of the Trustee.

Mr. HANEY.—Well, I don't know how the receipt reads—I have forgotten—but, as a matter of fact, it was advanced with the consent of the Trustee; but, as I understand it, it was advanced by Mr. Mason.

A. I took the receipt on behalf of the Trustee.

COURT.—That was my understanding of this receipt. I was trying to get it clear in my mind.

A. This is an agreement, your Honor, between the mortgagees of the vessel to take care of this vessel.

COURT.—This is: "Whereas the owners having failed to provide money with which to pay said wages and port charges, James V. Mason, as Trustee, for the mortgagee of said vessel."

Mr. HANEY.—Yes, sir.

COURT.—Very well, I understand it.

Q. Now, Mr. Mason, again directing your attention to the items aggregating \$856.58, will you please state what those items [112] were, and in what amounts, and when they were advanced?

Mr. MÁGUIRE.—I don't believe your Honor has ruled upon my objection yet.

COURT.—I will overrule the objection.

(Testimony of Jas. V. Mason.)

Mr. MAGUIRE.—The Court will permit me an exception?

COURT.—You may have your exception. Of course, at the final argument this ruling might be subject to be recast.

“With regard to the items of expenditure aggregating \$856.58 it was made up as follows: Towage off Sand Island, Columbia River to Astoria, when the vessel had broken down and was not under command, \$82.40; towage paid the Port of Portland from St. Johns to the Portland Lumber Company, where she is lying, \$82.40; October 25th, Columbia River Bar Pilots, \$50.00; for bringing vessel from Astoria to Portland or St. Johns Terminal No. 3; November 6th, pilots, \$15.00, for moving vessel from St. Johns to her permanent berth at Portland Lumber Company; October 26th I hired a watchman and agreed to pay him \$100.00 a month. On December 9th I paid him \$200.00. I paid the Portland Lumber Company \$89.00 for berthing the vessel from November 4th to January 31st. That reduces so that my claim is \$845.58.

“While the vessel was at St. Johns Terminal No. 3 from October 26th to November 4th, before I moved it to the Portland Lumber Company I paid the Dock Commission \$48.24. On November 12 the laundry of the vessel, blankets and everything in connection with it, were lying all over the ship and I had them packed away and sent to the State Laundry Company to be laundered. I paid them \$38.65 for that. On December 14th I paid the St. Helens

(Testimony of Jas. V. Mason.)

Ship Company for repairs to the vessel on August 8th, \$100.84. On December 1st I sent notices to the shareholders of all this that I did and accounts and different things, how much I had on hand, [113] and how much would be necessary to take care of this vessel. They were multigraph copies and cost \$28.38 and \$20.66. On December 9th I paid the Portland Marine Supply Company \$2.55 for coal oil for the vessel, it having no steam, and the electric lights not working in the evening. On December 14th I paid the United States National Bank \$45.20 interest on that note. I didn't think that should be paid in, but I put it in anyhow because I paid it."

COURT.—Do you think that should be in?

Mr. HANEY.—I don't think that is a lienable item, your Honor, but I put it in.

A. I didn't think so myself, your Honor, but I put it in because I had a receipt for it.

COURT.—Very well.

A. That amounts to \$845.58 and includes the \$45.-20 interest. None of these moneys have been repaid to me.

(Libellant Mason's Exhibit 18 for identification are the receipts showing this expenditure.)

Mr. HANEY.—I offer that in evidence.

Mr. MAGUIRE.—I object to each and every item of the exhibit upon the ground that no foundation has been laid for their admission; that they and each of them are not lienable items, and particularly are not maritime liens.

Objection overruled.

(Testimony of Jas. V. Mason.)

Marked Intervening Libellant Mason's Exhibit 18.

Q. Mr. Mason, I hand you Intervening Libellant Mason's Exhibit 19 for identification, and ask you if that covers the item of \$6,600.00 testified by you as having been advanced to the captain?

A. \$6,600.00 and I advanced him \$53.86 to complete this [114] when he arrived in Portland.

Q. But that is the item that you testified as having advanced the captain, and for which you have receipts?

A. Yes. The captain handed me receipts.

Mr. HANEY.—I am going to offer this in evidence.

Mr. MAGUIRE.—Let the same objection go to this exhibit as to the one immediately preceding it.

Objection overruled—exception allowed.

Marked Intervening Libellant Mason's Exhibit 19.

Upon cross-examination the witness testified as follows:

“I have been connected with the marine business all my life. I am president of Portland Marine Supply Company, vice-president of the Oregon Stevedoring Company, Pacific Marine Construction & Repair Company. We operate a repair barge. I am familiar with and the operation of the same, through all of the years I have been in that business. Mr. Green discussed with me on one or two occasions the matter of the claim of the Coast Ship-



(Testimony of Jas. V. Mason.)

building Company for the amount in excess of approximately \$25,000.00, which at that time was an unliquidated amount. I told Mr. Green and the Coast Shipbuilding Company that they had no claim against the ship by reason of these amounts. I gave him the same reasons I explained, how could he come on with an explanation the same as what he had told me, and according to his letter that it was payments that had not been arranged or regulated as far as the Emergency Fleet Corporation is concerned. So I asked him at that time, "Well, how is it? They don't owe you any money, do they?" "Well," he says, "as far as the material we have been getting down there." I said "You had to pay for it." I says, "You do the same as I do. If you want anything you go down and select it, you get a price for it, they tell you how much it is, you [115] give a check, and you cannot return it." Sometimes they don't even give you half you buy, and then you have no way to get your money back. So I couldn't understand why he would put that in his letter at all, so far as the Emergency Fleet Corporation was concerned.

"This was Mr. Green's first venture with ships. Mr. Green didn't rely upon my judgment and experience because I was opposed to the vessel all the time and the way it was handled, and he kept away from me until he got in trouble, and then they came when they thought they would need some of my money. They didn't come to me for advice on any matter until the ship got in trouble in San Pedro



(Testimony of Jas. V. Mason.)

and then they figured that probably I was the only one who could get any money to get the vessel out of this, because everybody else was disgusted with the vessel, myself included.

Q. Now, you say you had a conversation with Mr. Green immediately prior to this meeting with regard to this claim, that you had again told him that he had no claim?

A. I had a conversation with Mr. Green.

Q. That the Coast Shipbuilding Company had no claim rather?

A. I had a conversation with Mr. Green four days before. I couldn't understand why he couldn't arrive at the cost of the vessel. I couldn't understand how he could prove that it was his material that went into this vessel, how he could tell, because they owed me some money, and I couldn't tell; I couldn't tell my material, if it went into the vessel; just the same as I told him at the time about these valves. He bought the valves from the Emergency Fleet Corporation, the Coast Shipbuilding Company to put in this vessel. When they found they didn't fit [116] the vessel, or were of no use to the vessel, they placed them in their yard. I don't know who paid for them. Somebody paid for them. Maybe those other people may have put up some money. Maybe they think they are in the vessel, but they are not in the vessel.

Q. Were these valves, you say?

A. Yes, valves. They found that they were not suitable. They paid the Emergency Fleet Corpora-

(Testimony of Jas. V. Mason.)

tion for them. They wouldn't take them back. They had the Coast Shipbuilding Company's money—they wouldn't take them back. I bought them later. They were marked distinctly with tags for the "Egeria." They had gone somewhere else and I paid for them. So I explained a lot of these things, how could he tell? How did he have a claim? Was it a claim for commission, or was it a claim for floating the business, or what was it for? I couldn't see why the boat cost any more money. It seemed to me it was impossible. He never could prove the claim to me.

Q. Did you offer to go over the books with him?

A. They didn't have any books, I don't think.

Q. Just answer the question. Did you offer to go over the books with him?

A. No, I didn't. I didn't.

Q. Now, being in the shipping business, you were familiar with the provisions of the 1920 Shipping Act in regard to ship mortgages?

A. Yes, I believe it was. I believe I am.

Q. You were at that time?

A. No, not at that time, I was not. I didn't find out about those—what do you call them again, what do you say, about the principles of the Act, or whatever it is. I didn't find out [117] that until I was down in San Pedro lifting the libel off this ship. And I learned a lot of things down there."

**Testimony of H. M. Montgomery, for Libellant.**

H. M. MONTGOMERY, being called as a witness on behalf of the libellant, was duly sworn and testified as follows:

“I am a deputy collector of customs and custodian of the records of the Collector’s office in the Port of Portland, with regard to the documentation of ships. Permanent Register No. 7 shows that the ship ‘Egeria’ was permanently registered under date of September 9th, 1920. On page 28 of Volume VI of the Records of Bills of Sale appears a bill of sale under date of September 15th, 1920, of interest in the ship ‘Egeria’ from the Coast Shipbuilding Company to H. B. Ainsworth and thirty-seven other people, by which 61/100 of the ship was conveyed to them. The ‘Egeria’ was redocumented by reason of this bill of sale in Permanent register No. 10 under date of September 21st, 1920. At page 77 of Volume G the Records of Mortgages of registered vessels in the office of the Collector of Customs, Portland, Oregon, appears a mortgage from the Coast Shipbuilding Company and H. B. Ainsworth and all other owners of the steamship ‘Egeria’ to F. H. Ransom, Trustee. Attached to the mortgage is the affidavit of Donald W. Green, Secretary of the Coast Shipbuilding Company, managing owners, that this mortgage was executed on the 1st of March, 1921, to F. H. Ransom, Trustee, by the owners of the ‘Egeria,’ by the Coast Shipbuilding Company, managing owner of said vessel, to secure the payment of \$35,000.00

(Testimony of H. M. Montgomery.)

in which sum the said owners are justly indebted to said F. H. Ransom, Trustee, and was made in good faith and without any design to hinder, delay or defraud any existing or future creditor of the mortgagors of any lienor."

It was thereupon stipulated by proctors for the respective parties that the matter of determining the attorney's fees may be fixed by the Court without any proof in the event that the Court [118] grants priority either to the libellant or intervening libellant Bankers Discount Corporation. Thereupon the Intervening Libellant F. H. Ransom, Trustee, and the Intervening Libellant Jas. V. Mason rested their case, and thereupon the Intervening Libellant Bankers Discount Corporation moved the court to dismiss the intervening libel of Jas. V. Mason upon the ground and for the reason that there is no foundation laid as to the authority of J. V. Mason to make the payments or incur the expenditure set forth in his libel. Further, that the items which he sets up in his libel are not lienable items and do not constitute maritime liens and are without the jurisdiction of the Court to enforce.

Thereupon the intervening libellant Bankers Discount Corporation further moved the Court that there be stricken from the record all testimony and each and every part thereof on behalf of the libellant J. V. Mason upon the ground that there has been no foundation laid, and particularly that libellant Mason's Exhibit 7 has not been properly proven.



(Testimony of J. L. Dunlap.)

Thereupon the intervening libellant Bankers Discount Corporation further moved the Court that the libel of F. H. Ransom be dismissed upon the ground and for the reason that it is an attempt upon the part of the owners of the ship to create a lien in themselves as against themselves and against their ship, and that their proper proceeding is not in admiralty, but is for a dissolution of the partnership existing between them, and an accounting.

Thereupon the Court took said motions under advisement until the argument, and thereupon the intervening libellant called the following witnesses, who being duly sworn testified as follows:

**Testimony of J. L. Dunlap, for Intervening Libellant.**

J. L. DUNLAP.—I live in Portland, and am an accountant, and was employed by the Coast Shipbuilding Company from the beginning of their [119] work until they sold out the last of the equipment in its yard last fall, a period of about four and one-half years. As accountant I had charge of the books, and records of accounts of the Coast Shipbuilding Company, and am familiar with those books and records and know that the steamship "Egeria" was altered during the period of my employment by that concern and I had charge of the records of the cost of that ship. I have before me those books, and have had 20 or 30 years' experience as an accountant. I have prepared from the books of the Coast Shipbuilding



(Testimony of J. L. Dunlap.)

Company a statement of the cost of that vessel, and the amounts paid thereon, which is marked Exhibit "A." Exhibit "A" is a correct statement of the cost of the steamship "Egeria," less the credit for cash received thereon, and of the amount due. I did not see every spike driven and I didn't see every plank laid, but according to the methods of keeping our records at the yard, I should say that all the items I have here went into the ship."

Whereupon proctor for the libellant and intervening libellant J. V. Mason entered the following objections:

Mr. HANEY.—I am going to object to this method of proving the material as having gone into this boat. I am not raising any question about the fact that he has made this memorandum from his books; but it doesn't seem to me this is the way to prove that material went into the boat. This man is not a builder. He has kept some books. To save our record I want to object to this method of proving it.

COURT.—I suppose you kept an account of everything that went into the ship?

Mr. MAGUIRE.—Yes, your Honor.

COURT.—And this record shows? [120]

Mr. MAGUIRE.—Yes, sir; we have the record here.

COURT.—I will admit the testimony.

Mr. HANEY.—May we have an exception?

COURT.—Yes.

(Testimony of J. L. Dunlap.)

“At the time we were building the ‘Egeria’ we were doing no other work, so it was a matter practically of straight accounting. There was no danger of the material getting mixed up with anything else. We had certain material in the yard which was drawn on to go into the ship. We had a storekeeper who had charge of that material in the yard, and in the warehouse. Whenever any material was wanted for the ship a requisition was made on the storekeeper, and he delivered the material and we kept a memorandum of the material in a book specially for that purpose. At that time a good deal of the stuff we had had been bought at different times, and it was rather a difficult matter to tell just exactly what the proper price of it was. So that we held that over for subsequent straightening out by going back to the original invoices and pricing these materials from the original invoices on which we ourselves had bought them. That was the general system. Other material that we needed—I was also purchasing agent, and other material that was needed for the ship requisition was made by the superintendent or one of the foremen for certain material, and I made out a requisition on the dealers after finding out where the material could be bought and what price it could be bought for. I made out a requisition on the dealer for the material. This requisition was in duplicate, and it was also checked by the warehouse man as having come into the yard, and then when the invoices came in, the in-

(Testimony of J. L. Dunlap.)

voices were checked against the copy of the requisition which had been O. K.'d as received by the warehouse man. Then the invoices [121] were put through the books, showing the charge to the steamship 'Egeria.' "

"The cost of the work and materials expended by the Coast Shipbuilding Company on the 'Egeria' was \$398,856.99, and in that connection I testify that there was no charge in this cost for the rent of the yard, for the use of the machinery or for my own salary. The charges that went in against the 'Egeria' were the actual cash expenditures for that ship in addition to the material we furnished out of the yard. In Exhibit 'A' there appears a credit of \$350,000.00 upon the actual cost of the ship. That credit was not put there by me upon the statement when I made it up. I merely made up a statement of the cost as shown by the books, and I presume that that \$350,000.00 was added by somebody else as representing what the ship was estimated to cost in the beginning. The actual amount of cash that we received, including our subscription was \$261,266.75. Part of the materials were furnished by the Coast Shipbuilding Company, and part were purchased from various parties. They were purchased from Mr. Mason of the Portland Marine Supply Company, Oregon Fisheries Supply Company, Marshall-Wells, Honeyman Hardware Company and different firms about town.

"In explanation of the delay in determining the actual cost of the ship I have to say that we

(Testimony of J. L. Dunlap.)

had a great many items pending settlement with the Emergency Fleet Corporation. In the first place we bought the hull from them, for which we paid cash \$70,000.00 and I think we paid cash for the engines before we received them. We made up a list of the bill of material No. 500 which was the name of the bill of material that went into the Ferris ships. We made up a list from what material that we wanted, and gave that to the Emergency Fleet people at St. Johns, and they were supposed to load that on to the hull to be towed [122] to our yard when she came up. When the ship arrived with this material aboard, it was quite a while later, and it was some little time before we got the material all off and got it into the warehouse and got it checked out. When we checked it out there were a great many shortages we took up with them, and they went back and forth from time to time, rendering us corrected bills, and in some cases I think rendering us two or three corrected bills. The last correction was not made until August 1st, 1921, the entry at that time amounted to \$4,196.13.

“The statement of Mr. Mason that when one purchased materials or ship fittings from the Emergency Fleet Corporation the amount had to be paid at the time of delivery did not apply with regard to the Coast Shipbuilding Company in the matter of the ‘Egeria’ and I don’t think the rule was made until some time after we had started purchasing the material. When they made the rule



(Testimony of J. L. Dunlap.)

it caused us a great deal of trouble, because the inventories of the Emergency Fleet Corporation were not complete and our superintendent not knowing whether he could find it or not, and not knowing what the price was it was impossible to take the cash along or a certified check as they required. We made a complaint to the head office and they very largely waived that rule. There was some stuff that we had to pay cash for before we ever found it. It was impossible on March 1, 1921, to state the exact amount of the alterations of this ship because of these items which were still pending settlement, the invoices had not been checked, and I don't believe bills had been rendered for all of it. At any rate the corrections had not been made and some of the items had not been paid for."

On cross-examination the witness testified as follows:

"I have been connected with the Coast Ship-building Company since their inception in June, 1917. We paid for the 'Egeria' before we got her. We made the first payment of [123] \$10,000.00 on February 19th, 1920. We paid for the hull \$70,000.00 and paid \$23,300.00 for the engines. In addition to that we took the bill of material No. 500 which was the Emergency Fleet Corporation list of material used in the construction of Ferris hulls, and picked out from that bill of material the articles that we thought we would need, and gave that list to the Emergency Fleet Corporation, and they were loaded on to the hull at St. Johns. This



(Testimony of J. L. Dunlap.)     -

material was of all sorts—flanges, valves, machinery, rope, canvas, etc. I could not give the various amounts of those articles without going through the books and checking them up because there are some counter credits, but the total of the account that we had with the supply and sales division of the Shipping Board as shown by the ledger, which may not include some of the items for which we paid cash outright—I wouldn't be sure as to that amounts to about \$155,000.00. The only way I could tell you what the items comprise would be by going down to the yard and digging up the invoices. We have invoices for them all. I don't want to say offhand that that was the total amount paid them, and without looking up the original entries. I wouldn't want to say just exactly what those credits were. That is the total of the debits against the Emergency Fleet Corporation for money that we paid them, but then there are some offsets on the other side. They are not very large. I think there were one or two invoices that we got mixed up on, for the reason that when they made a corrected invoice they gave the invoice a new number, and I think one invoice got in here twice. But that amount is practically correct—\$150,000.00 in round numbers would be correct. I don't think that the offsets amounted to more than \$1,500.00 or \$1,600.00. All credits and discounts which we received from the Emergency Fleet Corporation were credited to the 'Egeria,' reducing her cost. I find an item of \$1,200.00, one of \$709.00, one of

(Testimony of J. L. Dunlap.)

\$1,086.00 and one of \$521.00. I guess [124] that is practically all. I wouldn't say those are the only ones, but whatever we received are here in this account. The Coast Shipbuilding Company made a tentative settlement with the local board of the Emergency Fleet Corporation with respect to the materials it had on hand when it ceased work on government vessels and other vessels it was building in which they were interested, but none of the material used in the 'Egeria' was affected or included in that tentative settlement. We did not use in the 'Egeria' any of the material for which we received settlement or part settlement from the Emergency Fleet Corporation arising out of our other transactions because the Emergency Fleet Corporation material was taken down to St Johns. In arriving at the price of each piece of material we took the original invoice on which we bought the material. In 1920 all prices were higher than they had been at any time since and some of this material that we put into the 'Egeria' was material that had been bought one or two years previously, so that prices were much lower than the market that was prevailing at the time the 'Egeria' was built. I don't think the Coast Shipbuilding Company engaged in any other shipbuilding work at the time they were working on the 'Egeria.' We built a small barge, but I think that was before the 'Egeria.' Our installation department may have been doing some repair work, but that was a separate organization, and

(Testimony of J. L. Dunlap.)

was entirely independent of the Coast Shipbuilding Company. It was a separate corporation with a separate office, entirely distinct, in a separate building in a different part of the yard. I didn't handle the affairs of the Coast Installation Company and don't know who its officers were. The Coast Shipbuilding Company was not engaged in presenting its various claims against the Shipping Board and making settlement therefor, while it was engaged in reconstruction [125] work on the 'Egeria.' I think our claim against the Shipping Board was presented in November, 1919, and we got a tentative settlement from the local board here, and we presumed that that was completed and done away with and merely needed the payment of the cash to carry out the settlement. We made no charge for any overhead for the 'Egeria.' We were paying \$255.00 a month in taxes upon our lease on the yard, but the 'Egeria' was charged no rent of the yard. She was not charged with any electric power or steam power. She was not charged with the telephone, and practically no overhead. The \$155,000.00 included the \$70,000.00 for the hull and \$23,300.00 for the engines. The item of \$121,000.00 in Exhibit 'A' is a segregation of the 'Egeria' account. The 'Egeria' account of actual construction account stands on our books as \$324,453.59. Then in addition to that there was \$52,000.00 in labor paid out by our installation department for the installing of machinery, and then as I stated before we had an account for lumber and

(Testimony of J. L. Dunlap.)

other material which had not gone through the books, of our own material. There is none of our own material included in this costs that I have given for the 'Egeria' of \$324,000.00; that that I imagine that amount of \$121,000.00 was made up by taking some of those items, that is, miscellaneous items out of that material, and combining it with certain miscellaneous items that appeared in the regular account. We have the lumber item of \$10,500.00 in our statement, and hardware and iron item of \$18,000.00, and they are not any part of the \$121,000.00. The items appearing on the statement of \$147,000.00 are \$10,000.00 for lumber, \$18,000.00 for hardware, \$55,000.00 for direct labor, and \$52,000.00 for installation labor are not all the items that went into the 'Egeria,' which leaves out the miscellaneous material, accident insurance and miscellaneous direct expense. If you want a statement [126] showing the item of \$121,000.00 as itemized the only way to get that is by making an itemized statement of the whole 'Egeria' account, and that I am perfectly willing to do if I am given time enough. The way we handled our accounts—for instance, when we received the invoices they were entered up in a special book, and everything that belonged to the 'Egeria' was carried into the 'Egeria' column and then posted at the end of the month. Every invoice received during the month for the 'Egeria' was posted in one item into the account. Now, you could not segregate that without going back and picking out those original in-



(Testimony of J. L. Dunlap.)

voices to tell what the articles were. You spoke a short time ago, Mr. Haney, of the prices at which this material was charged and you just referred to the matter of the lumber. I would like to call your attention to the fact that there was 210,480 feet of fir that was charged at \$30.00 per thousand, and when the 'Egeria' was built that lumber was worth about \$65.00 per thousand. That as Mr. Duffy will know was just about the peak of the lumber market in 1920. In this \$121,000.00 summary that you have fixed there is an item of \$162.50 paid for a bond for the Overmire Steel Construction Company on their tanks. We thought it of sufficient importance to warrant a bond. We paid for the bond. There is an item of \$2,095.95 paid to Vickers & Company of Seattle. That was for a steering engine. Then there was a payment to the Overmire Steel Construction Company for tanks of \$65,000.00. I think that was a part of this item of \$121,000.00. The tanks were bought by Mr. Pennell. I didn't buy them. The total bill, which I think includes some work outside of the tanks was \$65,077.95. I think the tanks were \$65,000.00. Then there is an item here of \$5,009.88 paid to Finnigan & Williams, who were the plumbing and heating contractors on the job. I am positive that is in the \$121,000.00 item and I am pretty sure the [127] tanks are, too. There are a number of pretty small items that run through here that are so small they don't amount to a great deal. Here is State Accident Insurance, \$1,342.24. I could not



(Testimony of J. L. Dunlap.)

say whether any payment made to the United Sheet Metal Works shows here by itself. You see, it would show in the total invoices that were charged up for the month. For instance, on April 9th, I charged up March bills amounting to seven thousand odd dollars. Without going back to the record of invoices and picking out those invoices and checking out that item, I could not tell what they are. Every month is just the same way. In the month of September the bills were \$16,000.00. The direct labor on the hull and direct labor on the installation were kept separately because there were two departments and two separate corporations and each kept their own books. When the installation department closed out before the hull department did the hull department had a lot of machinery and stuff there to get rid of, and when they closed out they brought the books up and put them in my safe and sold their safe, so that I had their books, and when I made up the statement I turned to their account of the 'Egeria' and took off the total of the direct labor \$52,000.00. I have a direct knowledge of the exact material that went into the boat. I saw it. I saw the boilers and saw the tank. I saw coils of rope go aboard, and I saw a lot of material go into it, because I was in the yard somewhat. My information comes from what the books show, but I have as much knowledge as anybody conducting a large business can have of what goes on in the business. I not only kept the books but I did the purchasing and through the system that I adopted in purchasing, unless my men

(Testimony of J. L. Dunlap.)

were crooked—and I had no idea that they were—because they had been with me for a number of years and had been found thoroughly reliable—the stuff had to go into the ship. I had a warehouseman who was a very responsible and [128] careful man, and he checked all the material that I bought, and delivered it out on requisitions to the ship, or ordered it on requisitions, and then delivered it when it came. Mr. H. E. Pennell was the president of the Coast Shipbuilding Company, and died some time in 1920 before we finished the ‘Egeria.’ In any event it was before March, 1921. I never had the stock records of the Coast Shipbuilding Company, but from my knowledge of the business I think in March, 1921, A. M. Sherwood, Jr., was vice-president and D. W. Green was treasurer. I made up Exhibit ‘A’ some time last fall before I left the plant. So far as I can remember this is the only statement I made up, and Mr. Green said he would like those figures and I went to work and made them up. There are no items contained in Exhibit ‘A’ which do not represent labor and materials used in the reconstruction of the ‘Egeria’ prior to her trip to Australia except \$3,176.42, which was the wages of the crew which was aboard her before she sailed. Part of the engineers and firemen were down there tuning up the engine and getting things in shape to go to sea, and the captain as soon as we engaged him he was on the payroll and then there was \$1,249.79 for various supplies that the ship had to have in September, 1920, and there was nobody had any money; nobody for

(Testimony of Donald W. Green.)

us to call on to put up any money, and we put them up ourselves. These expenses were incidental to putting the ship into commission."

COURT.—Mr. Maguire, what is the amount of your claim?

Mr. MAGUIRE.—\$48,856.99.

COURT.—That is made up of balance unpaid on the cost of the ship?

Mr. MAGUIRE.—Yes, with the exception that this one item of \$3,176.42, which the witness has just explained to the Court.

**Testimony of Donald W. Green, for Intervening Libellant.**

DONALD W. GREEN.—I have lived in Portland, Oregon, 12 years, and first became interested in the Coast Shipbuilding Company in 1916. I was connected and interested in the corporation up to the time of the [129] reconstruction of the 'Egeria,' which was built by the Wilson Shipbuilding Company in Astoria for the Emergency Fleet Corporation. In selecting a ship from the Government, the best ship in this district seemed to be the one built by the Wilson Shipbuilding Company. They had a very, very good record during the war. The ship was a Ferris type hull wooden ship intended for the Emergency Fleet Corporation for wartime purposes. "Intervening Libellant's Exhibit C" is the agreement which the shareholders signed, and was got up by Mr. Pennell of the Coast Shipbuilding Company, and this or copies of this were signed by the different subsequent share-

holders. All of the stockholders did not subscribe on the list, but the typewritten matter was the same on all lists."

Intervening Libellant's Exhibit "C" is as follows:

**Intervening Libellant's Exhibit "C."**

With the offering of the Emergency Fleet Corporation to sell ship hulls, machinery and equipment at a considerable amount below cost, and owing to the fact of these ships and their equipment being immediately available, the Columbia River District enjoys a rare opportunity to secure seagoing tonnage which it has long needed for the expansion of its lumber trade and other industries.

The Fleet Corporation has several Ferris type hulls which have been finished up as seagoing barges which they offer to sell for \$75,000.00 each. These hulls can be converted into lumber carrying steamers of the schooner type, as illustrated by attached photograph. They would have a carrying capacity of approximately one million six hundred thousand feet of lumber or three thousand dead weight tons of coal or other bulk cargo.

With these hulls the Fleet Corporation is offering boilers, engines and full equipment for \$100,000.00, making total cost of hull, machinery and equipment \$175,000.00.

The engines referred to are triple expansion steam engines of 1400 horse power, and the boilers are the pipe boiler type equipped for coal burning. These should be changed to oil burners, which is an easy matter, and oil tanks provided of sufficient capacity for a steaming radius of at least seventy days.



An additional \$175,000.00 would supply oil tankage, pay for hull changes, etc., making the total cost of such a ship, ready for sea, approximately \$350,000.00.

The Coast Shipbuilding Company has the necessary facilities [130] and equipment for converting the hulls referred to into practical lumber carrying steamers and installing the machinery. This it is willing to do with the co-operation and financial support of the merchants of Portland. It is also desirous of operating the ship when completed, and guarantees to do so in a satisfactory manner and with the distinct understanding Portland is to be the ship's home port and that she will load all outward bound cargoes in the Columbia River District.

In order to accomplish this undertaking in a practical and businesslike manner it will be necessary to bank sufficient funds for the purpose and the Coast Shipbuilding Company proposes to do this by inviting investors to subscribe such an amount as may be recorded hereon against their signatures and which will represent their proposed holding in the ship referred to.

On a basis of \$350,000.00, a one-one-hundredth interest would amount to \$3500.00, and while it would be most desirable to have the ownership held in larger amounts, it is at the same time desirable to interest in shipping others than those who might desire to make a heavier investment in such an undertaking.

The Coast Shipbuilding Company therefore invites you to invest with it in the undertaking, with the full assurance that such a venture will be pro-



(Testimony of Donald W. Green.)

yards. The schedules for the equipment going into the ship were made at our yard, and we in turn placed that before the Fleet Corporation, received prices from them and bought the ship and the material as much as possible from the Fleet Corporation on account of the attractive prices at that time. The material which was furnished out of our yard, which was in a way a small portion of the amount was priced—the material itself was priced at the time of the purchase. I asked Mr. Whiting, who was the man in charge of the yard at the time, which prices were lower, the prices at the time we had purchased or at the time the ship was built. He told me the time before. I told him then to put it in at the time before, because that was what it actually cost us. We had some lumber in our yard left over, belonging to us. A great deal of that lumber was finished lumber, going in the cabins, etc., of the ship, and we put a price on at that time which was at that time considered very reasonable, of \$30.00 a thousand. We would go to the Fleet Corporation with our schedules and ask them to give us their best prices on them. A number of times we purchased material from the Fleet Corporation. In other words, I mean to say material was delivered to us from the Fleet Corporation yard without payment by check, without the payment of it, and adjustment was made later. In fact, it was so hard for us doing business with the Fleet Corporation that many times I would go to Mr. Jay Hamilton, who was then in charge of the Fleet Corporation, and say that: "Due to your red tape, we are

(Testimony of Donald W. Green.)

being held back here considerably. Can't you cause orders on a certain amount of material, can't you call up St. Johns and let us get the material without our getting our certified check in your hand before." In several cases that was done. The Coast Shipbuilding Company did not charge into [132] the cost of the work on the ship any profit or overhead. The alteration and reconstruction was not a money making business."

Q. Now, when, if you know, was the final cost of the ship actually determined?

A. Mr. Maguire, I cannot state the actual time. I do not know that, due to the trouble that we had with the Fleet Corporation, I told several of the stockholders, after the ship had left on its first trip to Australia, I told several of the stockholders it was impossible for us to state the exact cost of the ship. In fact, the ship had gone to Australia and had come back here, and about three months after the ship had come back here we were still making adjustments with the Fleet Corporation.

Q. Upon what matters? I mean, referring to this ship or to your own?

A. Oh, yes, referring to material purchased on this ship. In fact, we had to, ourselves, go to the Fleet Corporation and ask them for three bills. One of them was the boiler bill. They never even billed the boilers to us, and we have taken those boilers at the time we were fitting up the ship. We had to ask them for that particular bill.

Q. Now, at any time did the Coast Shipbuilding



(Testimony of Donald W. Green.)

Company own this ship, other than its partnership or share-owning in it?     A. No, it did not.

“In explanation of why the ship was first registered on September 9th in the name of the Coast Shipbuilding Company rather than in the name of all of the shareholders, I have to say that there had to be some record. I talked with Mr. Montgomery about that and Mr. Montgomery stated that the proper method of procedure was for the Coast Shipbuilding Company to register in its own name, and then in turn give a bill of sale to the other shareholders of the ship. We did that some time in September. A few days later we made the bill of sale out to the [133] different shareholders. We gave each shareholder a bill of sale to their interests, or rather it is a certificate of ownership, I mean. When the funds were collected from the various shareholders they were not put in the general funds of the Coast Shipbuilding Company. As soon as the prices of the hull and the prices of the different materials which we would get at that time were made, we sent out a letter to all the shareholders asking them to send us approximately—I believe the first call was for 50% and we asked them in the letter to make that out to the Coast Shipbuilding Company trustee account. The account was kept in the First National Bank, and as the Coast Shipbuilding Company had to pay out money for certain purposes it was paid from the Coast Shipbuilding Company trustee account to the Coast Shipbuilding Company proper who was doing the

(Testimony of Donald W. Green.)

work. We specifically asked the shareholders to make their payments to the trustee account. At one time we made inquiry of the Security Savings & Trust Company, asking how much it would cost to run the funds through them as a company, and I think they said the cost would be \$300.00 or \$400.00, so as to get out of that cost we handled it through a trustee account. A copy of the letter of November 26th, 1920, addressed by the Coast Shipbuilding Company as managing owner to Mr. Paul C. Bates, transmitting a certificate of ownership certified by the collector of internal revenue was addressed to each one of the shareholders of the ship. They were all the same. No question was raised at any time after November 6th, 1920, by any of the shareholders as to whether or not the cost of the ship ran over the \$350,000.00. We never received any communications on that. I remember one time talking with Mr. Mason about it but there was never any discussion about it except some small items. He asked about certain things at that time. I was a stockholder in the Coast Shipbuilding Company. I had no experience in shipbuilding or maritime matters prior to my connection [134] with the "Egeria." The Coast Shipbuilding Company did not operate the ship itself. When it was first started Mr. Pennell had been in the marine line for many, many years. He died in the latter part of June, and after that it was necessary for us, being managing owners, we didn't feel that we were capable of operating the ship—I remember

(Testimony of Donald W. Green.)

taking that up a number of times with Mr. Bates. In fact, it was with Mr. Bates that I went to the Columbia Pacific and arranged with them for them to do the actual operating of the ship. They handled it on her trip to Australia. We didn't want the responsibility of doing it.

"Mr. C. E. McCulloch of Carey & Kerr has a half interest, Mr. Pennell's estate has a one-sixth interest, Mr. A. M. Sherwood, Jr. has a one-sixth interest and I have a one-sixth interest in the Coast Shipbuilding Company."

On cross-examination the witness testified as follows:

"The capital stock is not paid up. I don't think half of it is paid. I understand Mr. McCulloch is acting for another party in his ownership of one-half of the stock. There have been several changes in the ownership in the capital stock of the Coast Shipbuilding Company since its origin. In fact, I believe three owners of the Coast Shipbuilding Company lived in New York—Emmett and one or two others. They were bought out by Mr. McCulloch, I will say, may be about three years ago. At the time of the transaction concerning the "Egeria" in the latter part of 1920 and the early part of '1921, the ownership of the capital stock of the Coast Shipbuilding Company was the same as at the present. Less than one-half of the capital stock has been paid for. I don't believe it is one-third paid for. Mr. Pennell was not alive at the time the bill of sale was made out by the Coast

(Testimony of Donald W. Green.)

Shipbuilding Company to the various owners of the sixty-one per cent of the ship. The Board of Directors at that time was Mr. Sherwood, Mr. [135] McCulloch and myself. I was the secretary of the company and was really conducting its affairs. The Emergency Fleet Corporation was paid for the hull, and the other portions of the ship we bought from it at the time delivery was made. It was about the same time the various owners of shares in the ship made their contributions. The major portion of the money was paid to the Coast Shipbuilding Company as trustee for the shareholders at the same time, and was paid prior to the time we paid for the ship to the Fleet Corporation. 61% of the ship was owned by somebody aside from the Coast Shipbuilding Company. The Coast Shipbuilding Company owned 39% of it and paid for it in cash, in the trustee account. I was present—in fact, called the meeting of the shareholders at the Chamber of Commerce Building. I believe Mr. Sherwood was there. Mr. McCulloch was not there. The purpose in calling the meeting was to acquaint the stockholders with the situation regarding the ship. As I remember the letter that we sent out called for suggestions as to how to raise the money necessary to get the ship out of the present difficulties at that time. Those difficulties consisted in meeting a deficit occasioned by the Australian trip and a proposal to change the tanks and increase her carrying capacity. I had talked with various of the stockholders, and had tried a



(Testimony of Donald W. Green.)

number of ways to raise the money without going to the shareholders. After the meeting was called it was finally determined that a mortgage might be put on the ship and the money raised secured by that mortgage. I told the shareholders at that time that this would be the first claim on the ship. I don't know whether I said it was or whether it would be the first claim, because we talked about the mortgage and I stated that the mortgage, if the mortgage was put on, it would be a first claim on the ship. I had in mind the claim of the Coast Shipbuilding Company when I made that statement as the claim of that company was already [136] a matter of record—in a letter of November 26th which we sent when we issued the certificates of ownership. When I say that it is a matter of record I mean it was to the knowledge of the shareholders as conveyed in the letter of November 26th, but I don't mean it was recorded. It was absolutely necessary that some money be raised in some manner if the deficit was to be met and the change made. In fact, I had gone out and secured I believe \$10,000.00 to pay off the crew half an hour before they claimed they would start suit on it. Prior to the meeting in the Chamber of Commerce I attempted to raise the necessary money to meet the deficit and make the installation in other ways—several times, and had been unable to do so, and so told the shareholders at the time of that meeting in the Green Room. I don't know who first suggested that the money be raised by advances, but

(Testimony of S. F. Wilson.)

about \$100,000.00. These loans were made at different times. The item being \$60,000.00 on the 23d of [138] March, 1920. I don't remember the exact date of the assignment by the Coast Shipbuilding Company of its claim in the amount of \$48,856.99 for the balance due for the changes in the 'Egeria.' The Bankers Discount Corporation made the loan to Mr. Pennell upon the agreement with him, and for and on behalf of this company that both the Coast Shipbuilding Company and the Installation Company would sign the notes and would assign any claims or rights they might have in the boat as security until the money was repaid.

"In the month of July, 1921, we advanced the sum of some \$7,000.00 or \$8,000.00 to pay some delinquent insurance premiums on the boat. Assignment of the claim had been discussed from time to time, but owing to get a proper settlement and accounting from the Emergency Fleet Corporation they claimed to be unable to determine its exact amount. Finally, about the time we made that insurance advance, and I think we put up some \$10,000.00 for them to pay off the crew, which was later repaid to us, we took a formal assignment of that claim. I think they professed to know at that time that the assignment they gave us was a little short of the amount that they really claimed."

Upon cross-examination the witness testified as follows:

"The Bankers Discount Corporation was engaged in the business of loaning money, and the first loan

(Testimony of S. F. Wilson.)

to the Coast Shipbuilding Company of \$60,000.00 seems to have gone out on March 23d, 1920. Later the loan was increased from time to time until it became \$100,000.00 or a little over. That \$110,000.00 which I mentioned includes the accumulated interest upon these loans. Neither my company nor myself are shareholders in the 'Egeria.' I learned about the unliquidated claim of the Coast Shipbuilding Company against the Emergency Fleet Corporation at the time this loan was made. Mr. Pennell had been trying very hard to get a [139] settlement with the Emergency Fleet Corporation, and finally procured a tentative settlement, but they had a great deal of difficulty seemingly in their accounting with the Emergency Fleet Corporation, at least that is what they reported to our office from time to time, and I think that the exact time that we took, or agreed upon an assignment of this claim was for an amount that would be fairly definite that they could assign was about the time that they had to pay up this insurance and pay off the crew. As I remember it, they had to have \$10,000.00 very suddenly one day to pay off the crew, and we put it up temporarily. Then we took an assignment of that claim, which had been promised to us, to cover those items and as general collateral to our large item, which we felt was very insufficiently secured the way the boat had turned out. That must have been about the 14th day of July, 1921. That is the actual date the insurance was paid. That was the time the assignment was formally executed. It had

(Testimony of S. F. Wilson.)

been promised sometime prior thereto. The general assignment of all of the assets of the Coast Shipbuilding Company to our company was made at the time the loan was made. This particular assignment that I mean to describe to you was the one of the claim of extras that they claimed to have put into the 'Egeria.' I first heard of this claim for extras put into the 'Egeria' before Mr. Pennell died. He told me the boat was going to cost in excess of the figures that he had determined, and explained that by saying that instead of materials coming down as he thought they would and labor coming down, seemingly materials and labor had gone up, and it cost him more money than he expected. And I had information that the boat was not going to be built as cheaply and exactly on the plan that he expected to build it, not very long after they had started. That was sometime in the latter part of 1920 or the early part of 1921, but we didn't know the exact amount. We got the formal assignment [140] of the alleged claim some time in July, 1921."

Thereupon there was offered and received as evidence Intervening Libellant's Exhibit "E" which was the formal assignment of the claim of the Coast Shipbuilding Company against the "Egeria" with the explanation that the assignment was prepared by the proctor for the intervening libellant Bankers Discount Corporation and the date of execution and assignment left blank and was not returned for some considerable time after it was prepared. At that



time it was duly executed and acknowledged, but neither the date of the indenture nor the date of the acknowledgment had been filled in. That the proctor instructed his stenographer to place in the date of the indenture as of the 15th day of July, for the reason that the assignment had been agreed to be given as of that date to cover the advances made on the 14th day of July, but by mistake the stenographer also inserted the date of the acknowledgment as of July 15th, but that it was not in fact acknowledged until some time in September, or October. It was thereupon stipulated between the parties that the Bankers Discount Corporation at the time of the execution of the assignment to it had knowledge that the mortgage executed by the managing owners in favor of Ransom as Trustee had been executed.

The foregoing is all of the testimony offered or received in said case. [141]

In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

In the Matter of the Ship "EGERIA," her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture.

F. H. RANSOM, Trustee,

Libellant,

and

J. V. MASON, BANKERS DISCOUNT COR-  
PORATION, a Corporation, and UNITED  
SHEET METAL WORKS, a Corporation,  
Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Cor-  
poration.

**Stipulation Re Testimony.**

IT IS STIPULATED that the foregoing is a full,  
accurate and complete statement of the testimony  
given and received in evidence in the above-entitled  
cause, and that the same, together with the original  
exhibits shall be certified by the Circuit Court of  
Appeals as part of the record in this cause.

JOSEPH, HANEY & LITTLEFIELD and  
JOHN C. VEATCH,

Proctors for Libellant and Intervening Libellant  
J. V. Mason.

WINTER and MAGUIRE,  
Proctors for Intervening Libellant Bankers Dis-  
count Corporation.

Filed July 11, 1923. G. H. Marsh, Clerk. [142]

AND AFTERWARDS, to wit, on the 24th day of July, 1923, there was duly filed in said Court, a praecipe for transcript in words and figures as follows, to wit: [143]

In the District Court of the United States for the District of Oregon.

No. A-8865.

F. H. RANSOM, Trustee,

Libellant,

vs.

THE "EGERIA."

**Praecipe for Transcript of Record.**

To G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon:

Please prepare and certify for filing in the United States Circuit Court of Appeals for the Ninth Circuit, a transcript of record in accordance with the rules of that court and include in said transcript the following portions of the record:

Original Libel.

Libel in intervention of J. V. Mason.

Libel in intervention of Bankers Discount Corporation.

Answer of libellant to intervention of Bankers Discount Corporation.

Reply of Bankers Discount Corporation to answer of libellant.

Opinion of the Court.

Exceptions to proposed decree.

Order overruling exceptions.

Decree.

Assignments of error.

Evidence.

Praeipie for transcript.

Notice of Appeal.

WINTER & MAGUIRE,

Proctor for Bankers Discount Corporation, Intervening Libellant.

Filed July 24, 1923. G. H. Marsh, Clerk. [144]

United States of America,

District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 1 to 144, inclusive, constitutes the apostles on appeal from the decree of the said Court in the case of the "Egeria" her masts, bowsprit, boats, anchors, cables, rigging, tackle, apparel and furniture, F. H. Ransom, Trustee, libellant, and appellee, the Bankers Discount Corporation, a corporation, intervening libellant and appellant, and J. V. Mason, intervening libellant and appellee; that said apostles have been prepared by me in accordance with the praecipe filed by the appellant, and the Rules prescribed by the United States Circuit Court of Appeals for the Ninth Circuit, and that the transcript of the record and proceedings contained therein is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said



praecipe and the said Rules, as the same appear of record and on file at my office and in my custody.

And I further certify that the cost of the foregoing apostles is \$44.60, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 26th day of July, 1923.

[Seal]

G. H. MARSH,  
Clerk. [145]

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[Endorsed]: No. 4067. United States Circuit Court of Appeals for the Ninth Circuit. Bankers Discount Corporation, a Corporation, and Coast Shipbuilding Company, a Corporation, Appellants, vs. Steamship "Egeria," Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and F. H. Ranson, Trustee, and J. V. Mason, and United Sheet Metal Works, a Corporation, Appellees. Apostles on Appeal. Upon Appeal from the United States District Court for the District of Oregon.

Filed July 30, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.

In the District Court of the United States for the  
District of Oregon.

No. A-8865.

F. H. RANSOM

vs.

THE "EGERIA."

**Order Extending Time to and Including July 31,  
1923, to File Record and Docket Cause.**

July 24, 1923.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in the above-entitled cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to and including July 31, 1923.

R. S. BEAN,

Judge.

In the District Court of the United States for the  
District of Oregon.

In the Matter of the Steamship "EGERIA," Her  
Furniture, Fittings, Tackle, Apparel, etc.

F. H. RANSOM, Trustee,

Libellant,

and

BANKERS DISCOUNT CORPORATION, a Cor-  
poration, and JAMES V. MASON,

Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Cor-  
poration.

**Order Extending Time Thirty Days to File Apostles  
on Appeal.**

It is hereby ordered that the intervening libellant Bankers Discount Corporation, and the Coast Shipbuilding Company be and they are hereby granted thirty (30) days additional time to cause to be printed and filed with the Clerk of the Circuit Court of Appeals for the Ninth Circuit their apostles in the above-entitled libel. This time to be in addition to the time heretofore granted of fifteen (15) days.

Done in open court this 11th day of May, 1923.

R. S. BEAN,

Judge.

[Endorsed]: No. 4067. United States Circuit Court of Appeals for the Ninth Circuit. Ordered

Under Subdivision 1 of Rule 16 Enlarging Time to and Including — 192— to File Record and Docket Cause. Filed May 31, 1923. F. D. Monckton, Clerk. Refiled Jul. 30, 1923. F. D. Monckton, Clerk.

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In the District Court of the United States for the  
District of Oregon.

IN ADMIRALTY.

F. H. RANSOM, Trustee,

Libellant,

vs.

The Steamship "EGERIA," Her Masts, Bowsprit,  
Boats, Anchors, Cables, Riggings, Tackle,  
Apparel and Furniture.

BANKERS DISCOUNT CORPORATION,

Intervening Libellant.

**Order Extending Time Thirty Days to File Apostles  
on Appeal.**

IT IS HEREBY ORDERED that the intervening libellant Bankers Discount Corporation and the Coast Shipbuilding Company be and they hereby are granted 30 days additional time to cause to be printed and filed with the clerk of the Circuit Court of Appeals for the Ninth Circuit their Apostles in the above-entitled libel.

Done this 18th day of June, 1923.

CHAS. E. WOLVERTON,

Judge.



[Endorsed]: No. 4067. United States Circuit Court of Appeals for the Ninth Circuit. F. H. Ransom, Trustee, Libellant, vs. The Steamship "Egeria," Her Masts, Bowsprit, Boats, Anchors, Cables, Riggings, Tackle, Apparel and Furniture, Bankers Discount Corporation, Intervening Libellant. Order. Filed Jun. 21, 1923. F. D. Monckton, Clerk.

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In the District Court of the United States for the District of Oregon.

No. A-8865.

F. H. RANSOME

vs.

THE "EGERIA."

**Order Extending Time to and Including July 25, 1923, to File Record and Docket Cause.**

June 12, 1923.

Now, at this day, for good cause shown, IT IS ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby, extended to and including July 25, 1923.

R. S. BEAN,  
Judge.

[Endorsed]: No. 4067. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 21, 1923. F. D. Monckton, Clerk.

In the District Court of the United States for the  
District of Oregon.

In the Matter of the Steamship "EGERIA," Her  
Furniture, Fittings, Tackle, Apparel, etc.

F. H. RANSOM, Trustee,

Libellant,

and

BANKERS DISCOUNT CORPORATION, a Cor-  
poration, and JAMES V. MASON,

Intervening Libellants,

and

COAST SHIPBUILDING COMPANY, a Cor-  
poration.

**Order Extending Time Fifteen Days to File  
Apostles on Appeal.**

IT IS HEREBY ORDERED that the interven-  
ing libellant, Bankers Discount Corporation, and  
the Coast Shipbuilding Company, be and they are  
hereby granted fifteen days additional time to cause  
to be printed and filed with the Clerk of the Cir-  
cuit Court of Appeals of the Ninth Circuit their  
apostles in the above-entitled libel.

Done this 27th day of April, 1923.

R. S. BEAN,

Judge.

[Endorsed]: No. 4067. United States Circuit  
Court of Appeals for the Ninth Circuit. Order  
Under Subdivision 1 of Rule 16 Enlarging Time to  
and Including May 12, 1923, to File Record and  
Docket Cause. Filed May 2, 1923. F. D. Monck-  
ton, Clerk. Refiled July 30, 1923. F. D. Monck-  
ton, Clerk.

In the  
**United States Circuit  
Court of Appeals**

For the Ninth Circuit

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**BANKERS DISCOUNT CORPORATION**, a corporation, and **COAST SHIPBUILDING COMPANY**, a corporation,

Appellants,

vs.

**STEAMSHIP "EGERIA"**, Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and **F. H. RANSOM**, Trustee, and **J. V. MASON**, and **UNITED SHEET METAL WORKS**, a corporation,

Appellees.

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**BRIEF OF APPELLANTS**

Upon Appeal from the District Court of the United States for the District of Oregon.

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**WINTER & MAGUIRE**,  
703 Title and Trust Bldg., Portland, Oregon,  
Proctors for Appellants.

**JOSEPH, HANEY & LITTLEFIELD**,  
Corbett Bldg., Portland, Oregon,  
Proctors for Appellees,

**F. H. Ransom**, Trustee, and **J. V. Mason**.

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No. 4067

In the  
**United States Circuit  
Court of Appeals**

For the Ninth Circuit

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**BANKERS DISCOUNT CORPORATION**, a corporation, and **COAST SHIPBUILDING COMPANY**, a corporation,

Appellants,

vs.

**STEAMSHIP "EGERIA"**, Her Masts, Bowsprit, Boats, Anchors, Cables, Rigging, Tackle, Apparel and Furniture, and **F. H. RANSOM**, Trustee, and **J. V. MASON**, and **UNITED SHEET METAL WORKS**, a corporation,

Appellees.

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**BRIEF OF APPELLANTS**

Upon Appeal from the District Court of the United States for the District of Oregon.

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**STATEMENT OF THE CASE**

This is an appeal from a decree of the District Court of the United States for the District of Oregon, and arises out of the claims of lien against the Egeria pro-

pounded by F. H. Ransom as trustee under a mortgage which with principal and interest amounts to \$43,716.95, by J. V. Mason for moneys alleged to have been advanced by him upon the credit of the vessel, amounting to \$8,565.48, by the United Sheet Metal Works for work and material furnished the vessel in the amount of \$367.34, and by the Bankers Discount Corporation, as assignee of the claim of the Coast Shipbuilding Company for repairs and alterations amounting to \$53,286.70.

The District Judge, Honorable Charles E. Wolverton, decreed that the various claimants were entitled to liens in the amounts above scheduled, together with costs, and in the order of priority hereinafter set forth:

J. V. Mason.....	\$ 8,565.48
F. H. Ransom, Trustee.....	43,716.95
United Sheet Metal Works.....	367.24
Bankers Discount Corporation.....	53,286.70

It was agreed between the parties that the United Sheet Metal Works were entitled to a lien that would be paid irrespective of the outcome of this appeal, and for that reason there is no contest as to the validity or priority of their lien.

In accordance with the decree the ship was sold by the Marshal for a sum sufficient to discharge the liens of Mason and Ransom.

From this decree the Bankers Discount Corporation



has appealed, and contends that its lien is superior to that of both Ransom and Mason.

There are only four questions in the case, namely:

1. Is the mortgage to Ransom, trustee, entitled to a preferred status under the Ship Mortgage Act of 1920;

2. Is the lien of the Bankers Discount Corporation prior to that of the Libellant Ransom;

3. Is Mason entitled to a lien in his own behalf, or are the lienable items in his claim tacked on to and really a part of the lien of Ransom, Trustee; and

4. Is his lien inferior to that of the Bankers Discount Corporation.

“The Egeria” was owned by a syndicate of individuals, firms and corporations residing in Oregon, principally in the city of Portland, among which was the Coast Shipbuilding Company. The total number of shares in the ship was 1000 of the value of \$3500.00 each. Of these the Coast Shipbuilding Company was the owner of 39 for which it paid cash, the balance was owned by others, but the appellant, Bankers Discount Corporation, was not interested in the ship as an owner. (Apostles, )

“The Egeria” was built for the United States Emergency Fleet Corporation by the Wilson Shipbuilding

Company of Astoria. Upon its completion it was loaded and proceeded upon a voyage to Portland, Oregon, was unloaded, and after its purchase by the syndicate was towed to the dock of the Coast Shipbuilding Company to have alterations and repairs made upon it so as to fit for the off shore lumber carrying trade.

At the time of its purchase it was contemplated that the cost of the ship, together with cost of the repairs and alterations would not exceed \$350,000.00, but the cost of labor and materials advancing, it exceeded that estimate by \$48,856.99. This excess constitutes the basis of the claim of the appellants, inasmuch as the shareholders did not pay this excess into syndicate funds.

In order to complete the repairs and alterations, it became necessary to obtain additional funds and the Coast Shipbuilding Company borrowed \$110,000.00 from the Bankers Discount Corporation from time to time, of which \$8,000.00 was to pay delinquent insurance premiums on the ship and \$10,000.00 to pay the wages of the crew. At the time of the first loan the Coast Shipbuilding Company agreed to assign to the Bankers Discount Corporation all claims and rights which it made against the ship as security. The formal assignment of the Shipbuilding Company's lien was not executed, however, until July 15, 1921. (Apostles )

On March 1st, 1921, the ship and its owners executed to F. H. Ransom as trustee a note and mortgage for

\$35,000.00, bearing interest at 10%, and the funds for this loan were contributed by the shareholders in the ship. A default was made in the payment of interest and insurance premiums and a foreclosure was instituted by filing a libel for that purpose.

The appellant, Bankers Discount Corporation, filed its answer and cross libel setting up the lien of the Coast Shipbuilding Company and its assignment to the appellant, and the intervening libellant, Mason, filed a cross libel for his claim.

The lien of the Coast Shipbuilding Company is prior in time to the liens of both Ransom, trustee, and Mason, and is superior to that of Ransom without question, and to that of Mason as well if, as we believe, Mason's claim is properly tacked on to that of the trustee.

New Bedford Dry Dock Company vs. Purdy,  
258 U. S. 96, 100.

It is claimed, however, that the lien of the Coast Shipbuilding Company was waived in favor of the mortgage by the declaration of Donald Green, its secretary, and that Donald Green as secretary of the Shipbuilding Company has power and authority to waive the lien, and that the Discount Corporation as assignee thereof is also bound by his actions.

From Libellant's Exhibit 3 and A, and from the testimony of Paul C. Bates (Apostles, 87), L. A. Lewis (Apostles, 104), C. A. Parks (Apostles, 114), George E. Walker (Apostles, 116, 117), and Donald W. Green (Apostles 162), and from that of the trustee himself, it is apparent that certain of the shareholders in the ship loaned \$35,000 to themselves, took a mortgage from themselves, and now claim this mortgage to be a first and preferred lien upon the ship.

## POINTS AND AUTHORITIES

## I.

The mortgage to Ransom, Trustee, is not entitled to a preferred status.

41 Statutes at Large, 1000.

## II.

Even a mortgage of preferred status is inferior to a lien of the alterations and repairs.

41 Statutes at Large, 1000.

Sub-section M.

## III.

One deals with an agent at his peril, and it is his duty to ascertain the nature and extent of the agent's authority.

Baker v. Seawear, 63 Or. 350.

## IV.

There is no presumption that the President or Secretary of a corporation has authority to dispose of the assets or property of the corporation.



## 8

Luse v. Isthmus T. & R. Co., 6 Or. 125.

Bell & Co. v. Vogt, 87 Or. 102.

## V.

The officers of a corporation have only those powers conferred upon them by statute or by the by-laws of the corporation, or by authority of the board of directors.

Luse v. Isthmus T. & R. Co., 6 Or. 125.

Crawford v. Albany Ice Co., 36 Or. 535.

Harding v. Oregon-Idaho Co., 57 Or. 33, 41.

## VI.

No officer of the corporation, even the board of directors, may dispose of the assets of the corporation without consideration.

Bassick v. Aetna Explosives Co., 246 Fed., 974.

## VII.

The burden is upon the libellants to prove the authority of Green to waive the lien of the Coast Ship-building Company.

Bagot v. Inter-Mountain Milling Co., 100 Or. 127.

Baker v. Seawear, 63 Or. 350.

Reid v. Alaska Packing Co., 47 Or. 215.

## VIII.

The mortgage to the trustee is void as to the Bankers Discount Corporation, inasmuch as it is an attempt on the part of the owners of the boat to create preference in themselves as against other lien claimants.

## IX.

The mortgage is void as a preferred mortgage for the reason that it does not comply with the Ship Mortgage Act of 1920.

41 Statutes at Large, 1000.

## X.

Intervening Libellant Mason has no lien as it affirmatively appears that the moneys advanced by him were on the behalf of the mortgagee.

## XI.

All items of Mason's lien other than the \$6600.00 are not lienable as the disbursements were incurred at his direction after he had taken charge of the ship.

## ARGUMENT

The Trustee's mortgage is not entitled to a Preferred Status under the Ship Mortgage Act of 1920.

There is no allegation and no proof that the libellant's mortgage is a preferred maritime mortgage. Compliance with the provisions of the Ship Mortgage Act of 1920 (41 Stats. L. 1000) is not pleaded nor is there any proof of such compliance. Each and every element of sub-section D must be pleaded and proved in order to sustain a claim that the mortgage is entitled to a preferred status, for the reason that the statute provides that any valid mortgage \* \* \* shall in addition have in respect to said vessel and as of the date of the compliance with ALL of the provisions of this sub-division the preferred status given by the provisions of sub-section M IF.

1. The mortgage is endorsed upon the ship's documents in accordance with the provisions of this section;

2. The mortgage is recorded as provided in sub-section (C) together with the time and date when the mortgage is so endorsed;

3. An affidavit is filed with the recording of such mortgage to the effect that the mortgage is made in good faith and without design to hinder, delay or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel;

4. That the mortgage does not stipulate that the mortgage waives the preferred status thereof;

5. The mortgagee is a citizen of the United States.

There is no pleading or proof that the mortgage is or was endorsed upon the ship's documents as provided in (c) of that section, nor is there pleading or proof that the mortgagees are citizens of the United States.

Where one claims that a ship mortgage has a preferred status he must plead and prove that each and every of those things have been done which the statute provides must be done in order to entitle the mortgage to that status.

Again, even a preferred ship mortgage does not take precedence over maritime liens as appears from an examination of Sub-section M of the Act.

It is necessary therefore that the mortgagee establish not only that his mortgage has a preferred status, but also that the lien of the Coast Shipbuilding Company has been waived by the act of an agent authorized so to do.

This burden of proof rests upon the libellant.

## WAIVER BY COAST SHIPBUILDING COMPANY.

It appears from the record that at the meeting of the shareholders held on February 24, 1921, when it was determined that the \$35,000.00 should be raised among them and secured by a mortgage on the ship, Mr. Donald Green, who was the secretary of the shipbuilding company, informed the shareholders that this mortgage would be a first mortgage, or first lien on the ship. There is some testimony from some of the shareholders that Mr. Green specifically stated that the Coast Shipbuilding Company would waive its lien. This is denied by other shareholders (Edward Ehrman, Apostles, 109). Green admits that he told the meeting that the mortgage would be a first claim on the ship but denies that he ever waived the Coast Shipbuilding Company's lien. (Apostles, 161.)

The question to be determined is whether Green had any authority from his principal to make such statement and whether the Coast Shipbuilding Company or the Discount Corporation is bound thereby.

It may be predicated that not even a general agent, the president, secretary, treasurer, or even the board of directors of a corporation have a right to dispose or give away the assets of a corporation without consideration, or upon a grossly inadequate consideration.



“As a general rule it is not within the power of the officers or agent of a corporation to give away its assets or property, and this rule applies to the corporate directors, the president or general manager, and unless authorized by the directors the president or other officer has no power to dedicate corporate lands to public use.”

14a C. J. 420.

An instructive case upon this question is the late Federal decision of,—

*Bassick v. Aetna Explosive Co.*, 246 Fed. 974.

There the president of the corporation had entered into a contract with certain brokers to pay them exorbitant commissions for the sale of explosives during the war, and had in addition agreed that the brokers could retain as their own any sums which they might obtain over a certain price. As a result the brokers received nearly thirty per cent of the price for which the explosives sold. Afterwards the Board of Directors ratified the contract with the brokers upon the representation that they were in honor bound so to do because the president had made the contract.

The court in holding that the corporation was not bound thereby lays down the following wholesome rule:

“It is in the ultimate interest of business and the projection and prosecution of enterprises that the investing public must feel confident that a just appeal to the courts will not go unheeded and that the courts will not permit their property to be disposed of under circumstances which amount to a gift and those dealing with corporations cannot rely in such event upon the proposition that a board of directors has power in law to authorize a gift. Doubtless a natural person in the absence of fraud or duress can give away his property. Not so with the directors of a corporation as to corporate property.”

In the case at bar the act of Green amounted to a gift of the property of the corporation. The corporation had no knowledge of the gift, and such knowledge cannot be presumed for the reason that it had already contracted to assign its claim to the Discount Corporation. The Board of Directors never authorized or ratified the act of Green, who was himself a minor stockholder, his act was not for, but against, the true interests of the Coast Shipbuilding Company, and in direct contravention of a contract which it had already made with regard to the lien.

In addition to the foregoing, the Bankers Discount Corporation was a creditor of the Shipbuilding Com-

pany, and as such creditor had the right to have its assets preserved and not dissipated.

Assuming for the purpose of argument that Green as secretary had as great power and authority as he would have had if he had been president of the concern, still the libellants cannot recover upon the claim of waiver.

First, let it be said that neither the secretary or treasurer of a corporation has power to assign choses in action belonging to the corporation unless such authority is expressly or impliedly conferred, and this goes so far that it has been held that the treasurer of a corporation has no power to assign a mortgage given to the corporation.

Holden v. Phelps, 135 Mass. 61.

Jackson v. Campbell, 5 Wend. (N. Y.) 572.

The president of a corporation has no power by virtue of his office to sell or otherwise dispose of the corporate franchise, or its real or personal property when this is not in the regular course of the company's business, nor can he appoint an agent to make such sale, and it has been held that he has not such power even though he is authorized to act as superintendent or general manager in the conduct of the corporation's ordinary and routine business.

14a Corpus Juris 416.

Integrity Min. & Co. vs. Moore, 130 Mo. App. 627.

East Cleveland R. Co. v. Everett, 19 Ohio Cir. Ct. 205.

The Coast Shipbuilding Company is an Oregon corporation, therefore the powers of its officers are those which are conferred by the laws of Oregon and defined by the decisions of its courts.

It might readily be assumed that the President of a corporation and its general executive would have greater power than a mere Secretary, who by the provisions of the by-laws alone had power to act as a clerical officer; but the powers of the President are greatly circumscribed by the laws of the State of Oregon. The first case upon the subject in Oregon is that of:

Luse v. Isthmus T. & R. Co., 6 Or. 125, 131.

There the President of the corporation on its behalf executed a chattel mortgage upon two of its locomotives and the corporation resisted an action to obtain possession of one of the locomotives upon the ground that the act was beyond the powers of the President. The Supreme Court affirmed the decision of the lower court, denying the validity of the mortgage in this language:

“Referring to the general incorporation law of this state, section 9, we find that the President of a corporation is authorized to preside at the meetings of the directors, and ‘to perform such other special duties as the directors may authorize’. By Section 11 he is authorized to act as inspector of corporation elections, and to certify who are elected directors. No other authority seems to be conferred by the general law on the President of the corporation. All other authority, except to preside at the meeting, be inspector of elections, and certify who are elected directors must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers under our law are exercised by the directors.

“In this case, then, the fact that Utter was President did not, itself, imply the authority claimed for him. What power he had must be found confirmed, as this case is presented by the by-laws. These simply appoint him, according to the finding, ‘business and financial agent’. Do these terms imply an authority to mortgage the property of the corporation? A great variety of acts may unquestionably be included within the function of a ‘business and financial agent’. But this court, in *Fink v. Canyon Road Co.*, 5 Or. 305, indicated what ought to be the limitation of the authority of



such agents. It said: 'Corporations are certainly bound by (132) their simple contracts, and by other acts of their officers and agents made and performed in the discharge of their ordinary duties; and the courts have carried this doctrine so far as to hold that they may take notice of the general nature of the duties of a cashier, in and about a banking office, and without evidence of usage or express authority, hold him authorized to do all incidental acts necessary to the performance of those general duties. (*Watson v. Bennet*, 12 Barb. 196.) This case presses closely upon the very verge of the law, and further we think the courts ought not to go.'

"The doctrine here recognized is that the acts of a general agent, which will be binding on the corporation without express and special authority, and acts done in the discharge of 'ordinary duties'. And Mr. Redfield holds, 2 Redfield on Railways, 582, that the general business agents of a company have only authority to transact those functions of the company which come under the general denomination of business. All the business of a company does not imply anything but ordinary business, 'what is called the proper business of such a company', that is, in the case of a railway, the construction and operation of their road. It requires no argument or evidence, we

think, to render it apparent that this attempt of Utter to mortgage,—in effect to sell—the locomotive which was in actual use on the company's road, for a precedent debt, was beyond and outside of the ordinary business of the corporation. It was not necessarily incident to the construction or operation of the company's road, but was rather a stride in the direction of annihilating its business, and defeating the operation of the road."

The doctrine here recognized is that the acts of the general agent which will be binding upon a corporation without express or established authority are acts done in the discharge of "ordinary" business.

The Luse case was followed by:

*Crawford v. The Albany Ice Co.*, 36 Ore. 535 in an opinion by Judge R. S. Bean, now of the Federal Bench. There the President and Secretary of the corporation had executed a note for \$255.00. An action was brought upon the note, the company denied the authority of its officers to make the note, and the trial court found for the company. In affirming the decision the Supreme Court uses the following language, which is particularly pertinent to the case at bar:

"It is elementary law that the President and Secretary of a corporation, as such, have no power to bind the corporation by the execution of prom-

issory notes or other contracts, but such authority 'must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratifications on the part of the corporation, whose powers, under our law, are exercised by the directors': *Luse v. Isthmus Transit Ry. Co.*, 6 Or. 125, 131, (25 Am. Rep. 506); *Blood v. La Serena L. & W. Co.*, 113 Cal. 221 (41 Pac. 1017, and 45 Pac. 252); *Lyndon Mill Co. v. Lyndon Literary & Biblical Inst.*, 63 Vt. 581 (22 Atl. 575); *People's Bank of New York v. St. Anthony's Catholic Church*, 109 N. Y. 512 (17 N. E. 408); *Leggett v. New Jersey Mfg. & Bank. Co.*, 1 N. J. Eq. 541 (23 Am. Dec. 728); *Dabney v. Stevens*, 40 How. Prac. 341. It is expressly admitted that Crawford and Stockman had no direct authority from the corporation to execute the note, and there is no evidence of an implied authority to do so. So far as the record discloses, this was the only promissory note ever executed by them or anyone else for or in behalf of the corporation, and is the only instance in which such officers attempted to bind it by contract. There is, therefore, no room for the argument that the note was executed by the express or implied authority of the corporation.

"But the main contention of the plaintiff is that its execution was subsequently ratified. Upon this

point the evidence and the offers to prove show that the note was given to Casey for a debt due him from the corporation for labor and services rendered, and that two of the five directors, besides Crawford and Stockman, subsequently knew of its execution, and never expressly disaffirmed or objected to it. But this is not sufficient evidence of a ratification to bind the corporation. A ratification by a principal of the unauthorized acts of an agent must be shown either by express words or by some act or conduct on his part, after full knowledge of the facts, inconsistent with any intention other than the adoption of such act as his own; and, in case of a corporation, by proving that the officers who had the power in the first instance to authorize the act, with a full knowledge on their part of all the material facts, adopted it as the valid act of the corporation. It is true, such a ratification need not be in express words, but may be inferred from corporate acts inconsistent with any other supposition than that the ratification to prove that the proper officers of the corporation, having such knowledge, acquiesced in and adopted the acts of the agent; and there is no proof of that character in this case: *Murray v. Nelson Lum. Co.*, 143 Mass. 250 (9. N. E. 635); *Howe v. Keeler*, 27 Conn. 538. Where, as in *Finnegan v. Pacific Vinegar Co.* 26 Or. 152 (37 Pac. 457), the proper corporate officers, with full knowledge of all the

facts, accept the benefits or consideration of an unauthorized contract made in its behalf by one of its officers, the corporation thereby adopts the act as its own, and its assent and ratification will be presumed; but here the note was given on account of a pre-existing debt, and, if it was unauthorized at the time, the mere fact that the officers of the company may have known of its execution, and did not expressly disaffirm it, would manifestly not make it the binding obligation of the corporation in the hands of one who took with full knowledge of the circumstances under which it was executed, as is admitted in this case."

Again, in—

Harding v. Oregon-Idaho Co., 57 Or., 33, 41, it was sought to bind the defendant corporation by the acts of its President in ordering certain goods, wares and merchandise. The lower court found that the defendant corporation and its President were jointly engaged in getting out sawlogs and in manufacturing lumber therefrom. That the President was the principal owner of the capital stock of the defendant and by consent and agreement of the defendant the President was in control of its property and acting as its agent and had agreed with the plaintiff that the merchandise furnished by him to the employees of the defendant should be charged to and paid out of the wages of the employees. The plaintiff sought to bind the cor-



poration by declarations of the President as to its authority. The Supreme Court reversed the case, saying:

“Ferbrache is not a party to this action, and his acts and declarations, made while acting outside of his duties and authority as an officer of the defendant, are not competent evidence against it.

“The authority of the agent cannot be shown by the alleged agent’s own statements or acts, unless it be shown that the principal knowingly acquiesced therein: *Connell v. McLoughlin*, 28 Or. 230 (42 Pac. 218); *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 163 (44 Pac. 390); *Wicktorwitz v. Ins. Co.*, 31 Or. 569 (51 Pac. 75); *Hannan v. Greenfield*, 36 Or. 97, 103 (58 Pac. 888); *Sloan v. Sloan*, 46 Or. 36, 39 (78 Pac. 893).

“Neither does the office of President of a corporation confer authority to bind the corporation or control its property; 10 Cyc. 903; *Wait v. Nashua Armory Ass’n*, 66 N. H. 581 (23 Atl. 77); 14 L. R. A. 356; 49 Am. St. Rep. 630; *Lyndon Mill Co. v. Lyndon Literary Inst.*, 63 Vt. 581 (22 Atl. 575; 25 Am. St. Rep. 783). The President’s power as an agent must be sought in the organic law of the organization—the by-laws—or in some special order of its board of directors, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers are, under

the law, exercised by the directors: *Crawford v. Albany Ice Co.*, 36 Or. 535, 537 (60 Pac. 14)."

In the case at bar it appears from the testimony of Green the corporation had sold and disposed of practically all of its assets in order to get the money to complete the repairs and alterations to the "Egeria". Its claim for a lien upon the ship was practically all of its assets. It had already agreed to assign its claim to the Bankers Discount Corporation. The Shipbuilding Company and the Bankers Discount Corporation were in an infinitely better position with the lien on the ship as it then existed than they would be if they waived the lien and a mortgage was put upon the ship superior to the lien. By foreclosure of the lien they would have received their money or the ship would have been sold and the shareholders shut out from any further interest in the ship. This lien was a property right, and an asset of the corporation. The waiver of it constituted a gift of that claim and property and a diminution of the assets of the shipbuilding company. No authority was ever claimed by Green to waive the company's lien. No authority was granted to Green to make the waiver. His acts were never ratified by the company, it had no knowledge of the waiver, and neither the appellant Bankers Discount Corporation or the Shipbuilding Company ever received any benefits from the waiver or had knowledge of any benefits accruing to them or either of them. Nor had there ever been any course of

dealing from which the trustee or the shareholders advancing the \$35,000.00 could have implied that Green possessed such authority. We have found no case where under like circumstances the courts have held that a corporation could be bound by the acts of an unauthorized agent to the disposition of its assets in such manner. There is no parallel between this case and those where a corporation has permitted an officer to enter upon a course of dealing with the public by reason of which it is estopped to deny his authority. Green had never assumed or pretended to assume like authority prior to this occasion and there is no evidence that his assumption of authority was ever brought to the attention or ratified by the Coast Shipbuilding Company.

These earlier decisions have been uniformly followed by the Oregon courts. In,—

*Wilson v. Investment Co.*, 80 Or. 233,

the plaintiff brought action for work done upon a house owned by the defendant corporation. It was stipulated that the defendant corporation was the holder of the legal title to the house and that one Faber had ordered the plaintiff to do certain work on the structure and that the president of the corporation had stated that the bill was just and that the company would pay it. A verdict was had for the plaintiff, but the Supreme Court reversed the case, reiterating the Oregon rule with such clarity that we quote it at length:

“We come, then, to the question of liability of the Investment Company. Plaintiff appears to have based the obligation of the corporation upon the alleged language and promises of Quackenbush as president, but the record is absolutely silent as to his authority to bind the company. The mere fact that a man is president of a corporation does not give him any power to bind the corporation in any way. His powers are clearly defined in Sections 6691 and 6693, L. O. L., of which the former provides that he shall preside at meetings of the directors and perform such other special duties as the directors may authorize, and the latter section empowers him to act as inspector of elections. Speaking upon this point, in *Luse v. Isthmus Transit Co.*, 6 Or. 125 (25 Am. Rep. 506), Mr. Justice Shattuck says:

“ ‘Referring to the general incorporation law of this state’ (section 9), we find that the president of a corporation is authorized to preside at the meetings of the directors, and ‘to perform such other special duties as the directors may authorize.’ By Section 11 he is authorized to act as inspector of corporation elections, and to certify who are elected directors. No other authority seems to be conferred by the general law on the president of the corporation. All other authority except to preside at the meeting, be inspector of elections, and certify

who are elected directors, must be derived from some by-law of the corporation, or some special order, or must be implied by some acquiescence or ratification on the part of the corporation, whose powers under our law are exercised by the directors.'

"This ruling has been emphasized in *Crawford v. Albany Ice Co.*, 36 Or. 535 (60 Pac. 14); *Harding v. Oregon-Idaho Co.*, 57 Or. 34 (110 Pac. 412), and *Peek v. Skelley Lumber Co.*, 59 Or. 374 (117 Pac. 413); and such authority must be disclosed by the evidence. We have searched the record in this case in vain to find evidence, either of any by-law of the corporation, any special order of the directors, or anything in the way of usage or custom of the company, authorizing the President to bind the same by contracts."

Again in,—

*Bell & Co. v. Vogt*, 87 Or. 102, 104,

where the President and Secretary of a corporation had executed an assignment for the benefit of its creditors the Supreme Court reversed the lower court and held the document void, saying:

"This instrument cannot avail plaintiff as the foundation of its suit for the reason that it affirmatively appears from the reading of the evidence that the corporation had never authorized its Presi-



dent and Secretary to execute the same, and it has been decisively held by this court that under such circumstances the document is of no force or effect. *Luse vs. Isthmus T. R. Co.*, 6 Or. 125 (25 Am. Rep. 506) ; *Wilson v. Investment Co.*, 80 Or. 233."

The burden is upon the libellant to show that Green had authority from the shipbuilding company and not upon the Bankers Discount Corporation to prove that he did not have such authority. This rule is also affirmatively established in Oregon.

*Bagot vs. Inter-Mountain Milling Company*, 100 Or. 127, 131.

This was a contract in which McKinnon, a salesman of the defendant, entered into a contract to deliver two carloads of flour to the plaintiff. There was no proof of the authority of the salesman to bind the corporation. The court, speaking through Mr. Justice Johns, says:

"The defendant is a corporation and can only act through its agent and officer and the burden of proof was upon the plaintiff to show that McKinnon was authorized to make such contract or that by its conduct the defendant is estopped to deny his authority."

The court then cites *Baker vs. Seawear*, 63 Or. 350, to the effect that:

“A principal is not bound by the acts of his agent unless within the real or apparent scope of such agent’s authority. *One dealing with an agent is bound at his peril to ascertain the extent of the agent’s authority, and is chargeable with knowledge thereof.*”

In the Baker case, *supra*, the defendant had conferred upon his agent the authority to give checks to pay sheep herders and to purchase supplies and any ordinary expenses for a band of sheep. The agent thereupon purchased some horses and issued a check which was cashed and the principal brought suit for the amount of the check. A verdict was given against the defendant, and the Supreme Court reversed the case, using the following language:

“We will first ascertain the law as to the agency, and who must determine the issues thereunder. It may be stated generally that a principal is not bound by the acts of his agent, unless within the real or apparent scope of the authority of such agent; and one dealing with the agent is bound, at his peril, to ascertain the extent of the agent’s authority, and is chargeable with knowledge thereof. *Reid v. Alaska Packing Co.*, 47 Or. 215 (83 Pac. 139). And where a party relies upon a contract made with a person claiming to be an agent of another, he must prove, where the agency is dis-

puted, that he was expressly empowered to make the contract, and that its terms were within the scope of his authority. *Rumble v. Cummings*, 52 Or. 203 (95 Pac. 1111).

We call the court's attention to the case of *Reid v. The Alaska Packing Company*, 47 Or. 215, wherein it was held that the Secretary of a corporation whose duties are prescribed by the by-laws is without authority to ratify an unauthorized contract made by the agent of the corporation. We have taken the liberty to quote at length from Oregon decisions that are not only strictly in point, but because the Laws of Oregon are decisive in this case and are binding upon this court. The Shipbuilding Company is an Oregon corporation. The declarations of Green were made in Oregon. The trustee and shareholders are residents of Oregon and the mortgage was given in Oregon. But powers of an officer of an Oregon corporation are limited, by the laws of this state, and the decisions of its courts as to the effect of these laws and the nature and extent of the powers of officers and agents of its corporations are final, and it can make no difference that the courts in other jurisdictions may have adopted a more liberal rule. This case does not present the usual situation that arises where an officer of a corporation has attempted to waive a property right of a corporation. Donald Green was only the Secretary of the Shipbuilding Company. He owned but a small portion of its capital stock. Two-

thirds of the capital stock was owned by the estate of Harry Pennell and by C. E. McCulloch. Green in making the statement was not transacting the business of the Coast Shipbuilding Company. The Coast Shipbuilding Company received no consideration in the premises and it had already assigned and pledged its interests in the claim to the Bankers Discount Corporation, although the formal assignment was not executed until some time later. The appellant, Bankers Discount Corporation, has acted at all times in good faith. It was by its funds that the repairs and alterations to the ship were completed, that the insurance premiums were paid, and that the crew were paid when the ship returned from its trip to Australia. It had no interest in the ship or in the profits which the shareholders assumed would be theirs by reason of its operation. Upon what equitable principle can a claim of lien by the shareholders, who are co-partners to themselves, be preferred over a claim of a corporation which has furnished the funds which protected their interests and without which the vessel could not have been completed, which enabled the ship to go to sea, and which paid the insurance premiums and \$10,000.00 for the wages of its crew?

## LIEN OF JAMES MASON

The lien claimed by Mason consists of a large number of items which we schedule:

Advanced by Mason as Trustee for the mortgagee .....	\$6,600.00
Advanced to the Master .....	53.86
Telegrams sent to Master at San Pedro ..	40.00
Expenses of Mason in going to San Pedro	317.65
Internal Revenue Tax on Mason's note to the U. S. Bank .....	1.50
Towage from Sand Island to Astoria ....	82.40
Towage from St. Johns to Portland Lumber Company .....	82.40
Pilotage .....	50.00
Pilotage moving vessel from St. Johns to permanent berth .....	15.00
Watchman hired by Mason .....	200.00
Berthing vessel .....	89.00
Interest on note to U. S. Bank .....	45.20
Multigraphing Letters to Shareholders	28.36
Multigraphing Letters to Shareholders ..	20.66
Laundry on ship blankets after she was laid up .....	38.65
Dockage .....	48.24
Repair St. Helens Shipbuilding Company	100.84
Coal Oil .....	2.55

It appears that Mason went to San Pedro at the request of the mortgagee and acting for him to release



the vessel from the liens filed by seamen and ship chandlers. He advanced \$6,600.00 for this purpose. As trustee for the mortgagee, Mason's Exhibit 7, he took personal charge of the ship, directed her to proceed to Portland and the expenses other than the \$6,600.00 were the result of those directions given by him. It is obvious that these are not lienable items, and assuredly interest paid upon the note to the United States Bank, expenses for telegrams, and traveling expenses of Mason personally are not items of lien. It is only as to those items covered by Mason's Exhibit 7 that there is any evidence that they were advanced on the exclusive use of the "Egeria". All other expenses were incurred by Mason and the Trustee upon their own initiative and their own responsibility. Nor can it be maintained that the item of \$6,600.00 is a maritime lien in Mason's favor. Exhibit 7 recites that Mason as Trustee for the mortgagee has advanced this sum. This might entitle the libellant as trustee to tack the \$6,600.00 to his mortgage, but it does not give to Mason an independent lien.

## STATUS OF TRUSTEE'S MORTGAGE

In no event is the mortgage of the trustee good as against the appellant. This is a mortgage given by the owners of the boat to themselves. It may create a lien in favor of the contributing shareholders as against the non-contributing shareholders, but cannot be a lien as to

third persons. There is no principle of law whereby the owners of a boat or part of it can prefer themselves as against persons having a lien for repairs and alterations.

We submit that the decree of the court in so far as it gives the mortgage of the trustee priority over the Bankers Discount Corporation, and inasmuch as it gives priority to the Mason claim over that of the Bankers Discount Corporation is manifest error, and the lower court should be reversed and a decree entered providing that the Bankers Discount Corporation has a prior lien over both the trustee and Mason.

Respectfully submitted,

WINTER & MAGUIRE,  
Proctors for Bankers Discount Corporation  
and Coast Shipbuilding Company.

IN THE  
**United States Circuit  
Court of Appeals**

FOR THE NINTH CIRCUIT

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**BANKERS DISCOUNT CORPORA-  
TION**, a corporation, and **COAST SHIP-  
BUILDING COMPANY**, a corporation,  
Appellants,

vs.

**STEAMSHIP "EGERIA,"** her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture, and **F. H.  
RANSOM, TRUSTEE**, and **J. V. MA-  
SON**, and **UNITED SHEET METAL  
WORKS**, a corporation,

Appellees.

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**BRIEF OF APPELLEES**, **F. H. Ransom**, Trustee,  
and **J. V. Mason**.

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**WINTER & MAGUIRE**,  
703 Title and Trust Bldg., Portland, Ore.,  
Proctors for Appellants.

**JOSEPH, HANEY & LITTLEFIELD** and  
**JOHN C. VEATCH**,  
511 Corbett Bldg., Portland, Ore.,  
Proctors for Appellees, **F. H. Ransom**, Trus-  
tee, and **J. V. Mason**.



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No. 4067

IN THE

**United States Circuit**

**Court of Appeals**

FOR THE NINTH CIRCUIT

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BANKERS DISCOUNT CORPORA-  
TION, a corporation, and COAST SHIP-  
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Appellants,

vs.

STEAMSHIP "EGERIA," her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture, and F. H.  
RANSOM, TRUSTEE, and J. V. MA-  
SON, and UNITED SHEET METAL  
WORKS, a corporation,  
Appellees.

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BRIEF OF APPELLEES, F. H. Ransom, Trustee,  
and J. V. Mason.

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Upon Appeal from the District Court of the United  
States for the District of Oregon.

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**STATEMENT OF THE CASE**

The Steamship "Egeria" was purchased from the  
Emergency Fleet Corporation by a syndicate composed  
of various individuals, firms and corporations. The

ownership in the vessel was divided into 1,000 shares of \$3,500.00 each. Appellant, Coast Shipbuilding Company, owned 39/100 of the vessel and was the managing owner. The Coast Shipbuilding Company had fitted the vessel for service and had expended more than was contemplated in fitting out the vessel. The Coast Shipbuilding Company was indebted to appellant, Bankers Discount Corporation. The vessel was fitted out and sent on a voyage to Australia and lost considerable money on the voyage, due partly to the management of the vessel and partly to her construction which limited her cargo carrying space. It became necessary to secure the sum of \$35,000.00 to make up the deficit from the Australian trip and to make certain alterations to enable the ship to be operated profitably.

Donald W. Green, was a stockholder, director and secretary of Coast Shipbuilding Company and was managing its affairs. He had endeavored to raise the needed money in various ways but had been unsuccessful. Finally a meeting of some of the shareholders was held at which Green and one other director of the company were present and the plan of raising the money by mortgaging the vessel was discussed. At this meeting and at other times, Green stated that the mortgage would be a first lien on the vessel, and the various subscribers to the mortgage note made their subscriptions upon Green's representations that the mortgage would be a first claim. The mortgage was executed to F. H.

Ransom, as trustee for the various subscribers to the amount of the loan.

At the time the mortgage was executed the exact amount of the claim of the Coast Shipbuilding Company against the ship had not been determined. Subsequent to the execution of the mortgage the Coast Shipbuilding Company assigned its claim to appellants, Bankers Discount Corporation.

After the ship was put in commission again she made a trip along the west coast and was libeled at San Pedro for seamen's wages. Appellee J. V. Mason made certain expenditure in releasing her and in returning her to her home port at Portland, Oregon.

Default was made in the payment on the mortgage and appellee, F. H. Ransom, Trustee, started foreclosure, appellee, Mason intervened, setting up his claim for expenditure in releasing and preserving the ship, and appellants, Coast Shipbuilding Company and Bankers Discount Corporation, intervened setting up their claims. From a decree giving priority to the lien of Mason and the mortgagee this appeal is prosecuted.

## POINTS AND AUTHORITIES

Objections to the sufficiency of pleadings and proof must be taken by exception before appeal.

Admiralty Rule 24.

Pioneer Steamship Co. v. McCann, 170 Fed. 873.

Monongahela River Cons. C. & C. Co. v. Schinnerer, 196 Fed. 384.

The Quickstep, 76 U. S. 670.

The Gazelle, 128 U. S. 487.

Corporations are bound by the acts of their officers and agents acting within the apparent scope of their authority.

Sherman, Clay Co. v. Buffum & Pendleton, 91 Or. 358.

Where a principle, either negligently or intentionally, places an agent in a position to defraud a third part, and a loss occurs by reason of the agent's act without the fault of the third party, the loss should fall on the principle as between him and the third party.

Bridges v. Hurlburt, 91 Ore. 262.

Fiore v. Ladd & Tilton, 22 Ore. 202.

What are necessities giving a right of lien depend upon the circumstances under which the expenditures were made.

The Ascutney, 278 Fed. 991.



## ARGUMENT

Appellants rely upon three points for the reversal of the decree of the District Court: (1) That the allegations of the libel and the proof do not affirmatively show that the Trustee's mortgage is entitled to preferred status under the Ship Mortgage Act of 1920; (2) that Green as the agent of the Coast Shipbuilding Company had no authority to waive the lien of that corporation; and (3) that appellee, J. V. Mason, does not have a maritime lien.

### I.

#### THE MORTGAGE

The Ship Mortgage Act of 1920 provides, under subsection D (a) that the mortgage shall have preferred status if (1) the mortgage is endorsed upon the vessel's documents in accordance with the provisions of the act.

(2) The mortgage is recorded as provided in subsection C, together with the time and date when the mortgage is so endorsed.

(3) An affidavit is filed with the record of such mortgage to the effect that the mortgage is made in good faith, and without any design to hinder, delay, or defraud any existing or future creditor of the mortgagor or any lienor of the mortgaged vessel.

(4) The mortgage does not stipulate that the mortgagee waives the preferred status thereof, and

(5) The mortgagee is a citizen of the United States.

The libel alleges that the mortgagee is a citizen of the United States (Ap. 5) and this is undenied; a copy of the mortgage is set out in the libel and was introduced in evidence without objection (Ap. 13) and affirmatively shows that there is no waiver of preferred status; the affidavit required by the act is set out with the copy of the mortgage and evidence of its recording introduced in evidence (Ap. 137); the libel alleges the recording of the mortgage as to the date, book, page and other identification marks (Ap. 7-8) and evidence of such recording was received at the trial (Ap. 136). The only defect in either the allegations or the proof is in regard to the endorsement of the mortgage upon the vessel's document.

It is difficult to see how appellants claim they were injured by this defect in pleading and proof. The act provides that when the mortgage is filed that it shall be endorsed on the ship's documents by the Collector of Customs of the port of documentation or of any port in which the vessel is found. In the absence of allegations and proof on this point the presumption is that the Collector of Customs preformed his duty. (Sec. 799, Oregon Laws.)

If appellants were dissatisfied with the allegations of the libel or the evidence in support thereof they should

have raised the question by exceptions at the proper time.

### Admiralty Rule 24.

“Defects in libel not objected to either before or during trial, and which if so objected to might have been cured by amendment under the liberal rules of pleading in admiralty, are not ground for reversal of a decree rendered thereon.”

*Pioneer S. S. Co. v. McCann*, 170 Fed. 873.

Approved in *Monongahela River Cons. C. & C. Co. v. Schinnerer*, 196 Fed. 384.

“It is objected that the libel is too general in its terms and is defective because it does not state the particular acts of negligence and misconduct on the part of the tug which produced the injury, but if this were necessary the objection should have been interposed at an earlier stage of the proceedings, and cannot be taken for the first time after the cause has reached this court. It is always better to state the particular circumstances attending the transaction, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work an injury to the libellant, if the court can see that there was no design on his part in omitting to state them.”

*The Quickstep*, 76 U. S. 670.

"In the Courts of Admiralty of the United States, although the proofs of each party must substantially correspond to his allegations so far as to prevent surprise, yet there are no technical rules for variance, or of departure in pleading, as at common law; and if libellant propounds with distinction the substantive facts upon which he relies and prays appropriate relief, even if there is some inaccuracy in his statement of subordinate facts, or of the legal effects of the facts propounded, the court may award the relief which the law applicable to the case warrants.

*The Gazelle*, 128 U. S. 487.

## II.

### WAIVER BY COAST SHIPBUILDING COMPANY

The Coast Shipbuilding Company owned 39/100 shares of the "Egeria" (Ap. 27) and was managing owner of the vessel. Donald W. Green was secretary of the company, one of the three directors, owned a 1/6 interest in the company and was managing its affairs (Ap. 159-160). This corporation had a claim against the vessel for certain alteration and repairs. The ship had made a trip to Australia and had lost considerable money and it was necessary to raise \$35,000.00 to meet this deficit and make certain alterations to fit her for the coast trade (Ap. 161). To raise this sum a loan was

made and a mortgage given on the vessel. In order to induce various parties to furnish the money, Green, assured them that the mortgage would be superior to the claim of the Coast Shipbuilding Company (Ap. 84-100-105-109-110-113-115-120-161).

Appellants now claim that Green had no authority to make such a promise and waive the lien of his company that his doing so amounted to giving away the assets of the corporation and his act was never ratified by the board of directors; that Green was merely an agent and the mortgagees were bound to ascertain the extent of his authority.

When the Coast Shipbuilding Company waived its lien in order to secure a loan it was not giving away its assets. It was one of the principal owners of the vessel and it was imperative that the money be procured to protect its interest in the ship.

Mr. Green says: "It was absolutely necessary that some money be raised in some manner if the deficit was to be met and the change made. In fact, I had gone out and secured \$10,000.00 to pay off the crew half an hour before they claimed they would start suit on it. Prior to the meeting in the Chamber of Commerce I attempted to raise the necessary money to meet the deficit and make the installation in other ways—several times, and had been unable to do so." (Ap. 161). A previous attempt had been made to get a loan from a bank by offering a first lien on the ship. (Ap. 91.)



If the money had not been advanced, the Coast Ship-building Company would have been one of the heaviest losers. It had to have the money in order to protect its interest in the vessel. Instead of giving away its assets it was using the only means possible to protect what interest it had in the ship.

Proctors for appellants now come into court and claim that Green was without authority. He was the star witness for appellants and he says that he was managing the affairs of the company (Ap. 160).

It appears from the record (Ap. 160) that Mr. Green, Mr. Sherwood and Mr. McCulloch were the board of directors of the corporation; that Mr. Green and Mr. Sherwood, a majority of the board, were present when the subject of mortgaging the vessel was discussed and when Mr. Green told the mortgagees that the mortgage would be a first claim on the ship (Ap. 99-160). Section 6869 Oregon Laws, provides, among other things, that "The powers vested in the directors may be exercised by a majority of them."

Can a corporation, when it was represented at a meeting by a majority of its board of directors, where certain promises and representations were made on its behalf, now come in and say that such promises were not authorized? This is not the law. Even though Green acted beyond his authority, the corporation under these circumstances would be estopped from denying the agreement.

This would be true though Green had acted fraudulently. He was held out by his corporation as having authority to deal in matters pertaining to the "Egeria." He obtained money from other shareholders on the representation that the corporation's claim would be waived.

Even though the corporation itself were an innocent party, the law would impose the loss upon it rather than on the mortgagees, since its own act made the misrepresentation of the agent possible.

Bridges v. Hurlburt, 91 Ore. 262.

Fiore v. Ladd & Tilton, 22 Ore. 202.

Proctors for appellants devote considerable space in their brief on the powers of the officers of a corporation under the laws of the State of Oregon, and to the proposition that anyone dealing with an agent of a corporation is bound to ascertain the agent's authority. The law of Oregon as applying to the circumstances of this case is well expressed in the case of **SHERMAN, CLAY CO. v. BUFFUM & PENDLETON**, 91 *Or.* 358. "Since corporations can only act through their officers and agents, they have power to appoint agents with full authority to act for the corporation, and as a general rule all acts within the powers of a corporation may be performed by agents of its own selection. Express authority by resolution directing officers and

agents to represent the corporation in the execution of contracts is not indispensable with the exercise of that power. Their authority may be implied from their conduct and the acquiescence of the corporation. A person who knows that the agent of a corporation habitually transacts certain kinds of business for such corporation under circumstances which necessarily show knowledge on the part of those charged with the conduct of the corporate business has the right to assume that such agent is acting within the scope of his authority. It is now well settled that when, in the usual course of business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. The general principle that persons dealing with corporate officers and agents are bound to take notice of the extent of their authority must, of course, be considered in connection with the equally established rule that a corporation is bound by the acts of its officers and agents acting within the apparent scope of their authority, and, if the agent appears to be acting within his authority, the person dealing with him is not charged with knowledge of extrinsic facts making it improper for him to act in that case."

## III.

## THE LIEN OF MASON

Subsection P of the Ship Mortgage Act of 1920 provides, among other things that "Any person furnishing repairs, supplies, towage, use of any dry dock or marine railway, or other necessities, to any vessel," shall have a lien.

The evidence shows that all of the expenditures making up the total amount of the claim were made on behalf of the ship. That such expenditures were necessary to preserve and protect the ship. What items are proper subjects of a lien cannot be determined by considering each item of expenditure separately. The test is whether or not under the circumstances of the case, the expenditures were necessary to the ship. Thus in *The Ascutney*, 278 Fed. 991, expenditures for taxicab hire, telegrams, telephone, permits and postage were all considered proper items for a lien.

Mason was endeavoring to free the ship from libels, and bring her back to her home port and put her in such condition that the money invested in her would not be lost. There is no evidence that he could have done this with less expenditure and there is no evidence that the expenditures were not all on behalf of the ship and necessary in order to keep her fit for commerce.

We respectfully submit that the decree of the District Court was proper and should be affirmed.

Respectfully submitted,

JOSEPH, HANEY & LITTLEFIELD, and  
JOHN C. VEATCH,

Proctors for Appellees, F. H. Ransom,  
Trustee, and J. V. Mason.



# United States Circuit Court of Appeals

For the Ninth Circuit

BANKERS DISCOUNT CORPORA-  
TION, a Corporation, and COAST SHIP-  
BUILDING COMPANY, a Corporation,  
Appellants,

vs.

STEAMSHIP "EGERIA," Her Masts,  
Bowsprit, Boats, Anchors, Cables, Rigging,  
Tackle, Apparel and Furniture, and F. H.  
RANSOM, Trustee, and J. V. MASON,  
and UNITED SHEET METAL  
WORKS, a Corporation,

Appellees.

## PETITION FOR REHEARING

Upon Appeal from the District Court of the United  
States for the District of Oregon

WINTER & MAGUIRE,  
703 Title & Trust Bldg., Portland, Oregon,  
Proctors for Appellants.

JOSEPH, HANEY & LITTLEFIELD,  
Corbett Bldg., Portland, Oregon,  
Proctors for Appellees.



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## PETITION FOR REHEARING

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Upon Appeal from the District Court of the United  
States for the District of Oregon

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We doubt not that this court appreciates the emotions of counsel in preparing a petition for a rehearing. The burdens that ordinarily rest upon counsel's shoulders in the trial of a case in the lower court, and the presentation of it on appeal, are heavy enough, and when the appellate court, after mature deliberation,



has rendered an adverse decision, only a strong belief that the court has committed error impels the preparation and presentation of a petition for rehearing.

In the case before the court, however, we are so firmly convinced that the court's decision is based upon a misapprehension, of both the law and the facts, and that it works a great injustice upon the Bankers Discount Corporation, that we would be unquestionably recreant in our duty in not endeavoring to present those errors to the court. This we will endeavor to do as concisely and clearly as lies within our power.

The first proposition is that the court has erred with regard to its jurisdiction over this cause. The courts of the United States are courts of limited jurisdiction. The District and Circuit Courts act only by virtue of the powers granted to them by Congress, whose powers to confer jurisdiction are themselves limited by the Constitution of the United States. By the Constitution, the Federal Courts are given exclusive admiralty and maritime jurisdiction. No Federal Court sitting in admiralty may entertain any cause unless it shall appear both by the pleading and the proof that the controversy is one which comes within the admiralty jurisdiction.

The Supreme Court of the United States in the case of

lays down the rule that neither the admiralty courts of England nor of this country had any jurisdiction in questions of property between a mortgagee and the owner, and "no such jurisdiction has ever been exercised by the United States."

Until the passage of the Ship Mortgage Act of 1920, 41 Stats. at Large, 1000, the courts had not conferred any power in the matter of the foreclosure of ship mortgages upon Federal Courts sitting in admiralty, and it is clear that under this Act no jurisdiction is conferred upon the court to foreclose any mortgage unless it shall be entitled to the "preferred status" defined and prescribed by the Act itself.

Subdivision K, which is the only provision in the Act giving to the court jurisdiction of foreclosure, reads as follows:

"A preferred mortgage shall constitute a lien upon the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by such vessel. Upon the default in any term or condition of the mortgage, such lien may be forced by the mortgagee by suit in rem in admiralty. Original jurisdiction of *all such suits* is granted to the District Courts of the United States exclusively."

Subdivision L provides that in any suit in rem in admiralty for the personal enforcement of the "*preferred mortgage lien*" the court may appoint a receiver

and in its discretion authorize the operation of the mortgaged vessel, and the marshal may be authorized and directed by the court to take possession of the mortgaged vessel.

Subdivision N provides that upon default of any term or condition of a "*preferred mortgage*" upon a vessel the mortgagee, in addition to his action in rem, may bring suit in personam in admiralty for the amount of the outstanding mortgage and indebtedness or any deficiency.

It is clear from the reading of the Act that the court is without jurisdiction to foreclose a mortgage other than one entitled to the "preferred status." If a court has no jurisdiction except upon the existence of certain facts, can that lack of jurisdiction be waived, or can the court presume its existence? This question has been answered by the Supreme Court of the United States in the negative in a large number of decisions. The whole law on the subject is succinctly stated by Mr. Justice Harlan in the case of

#### HANFORD vs. DAVIES, 163 U. S. 273.

This was an appeal from the State of Washington wherein the Circuit Court was without jurisdiction unless the suit was one arising under the Constitution or Laws of the United States (and in the case at bar this court and the District Court of Oregon were without jurisdiction unless the controversy was one arising under that same constitution or under the laws of the

United States relating to admiralty). The court said:

“It is true the bill alleges that the probate court in all of its proceedings acted entirely without jurisdiction and without color of authority ‘save as the agent and organ of said territory.’ But this allegation of want of jurisdiction in the probate court is too general and indefinite to show that its proceedings were wanting in due process of law. If the purpose was to present a case under the clause of the Constitution relating to due process of law, the grounds upon which the Federal Court can take cognizance of a suit of that character between citizens of the same state should have been clearly and distinctly stated in the bill. It is well settled that, as the jurisdiction of a Circuit Court of the United States is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and Laws of the United States, the presumption is that a case is without its jurisdiction *unless the contrary affirmatively appears*; and that it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings but the averments should be positive. *Brown vs. Keene*, 8 Pet. 112; *Grace vs. American Central Insurance Co.*, 109 U. S. 278, 283; and authorities cited.

These principles have been applied in cases where the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship. But



they are equally applicable where its original jurisdiction of a suit between citizens of the same state is invoked upon the ground that the suit is one arising under the laws or Constitution of the United States. We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer in words to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the essential facts averred must show, not by inference or argumentatively, but clearly and distinctly, that the suit is one of which the circuit court is entitled to take cognizance. *Ansbro vs. United States*, 159 U. S. 695. \* \* \* We adjudge that the court below properly sustained the demurrer for want of jurisdiction, and therefore did not err in dismissing the bill."

If that is the law with regard to diversity of citizenship or a controversy arising under the Constitution or laws of the United States, then it is equally true with regard to that other special jurisdiction of the Federal Courts, namely, that of admiralty and maritime controversies. If it does not appear from the pleadings that the jurisdiction of facts existed, then neither the District Court or this court can proceed to grant to the libellant Ransom the relief which he seeks.

This court has endeavored by argument and inference (a thing which the Supreme Court of the United



States says cannot be done) to confer that jurisdiction by the statement that if an exception had been filed to the libel, the libellant could have amended, and if he had amended it may be inferred that the provisions of the law had been complied with, and it would be presumed that the Collector of Customs performed all of the things which he should have done.

This statement of the court is somewhat surprising and we must confess that we have been unable to find any decision which supports it. We candidly submit that it is novel to the law. If the court is right, then a complaint which does not state facts sufficient to constitute a cause of action, a complaint or libel which does not show upon its face that the Federal Court had jurisdiction, either in law, equity, or admiralty, may be sustained because if demurrer or exception had been filed it could have been amended, and then if it had been amended the necessary facts could have been proved. If this is the law, the Federal Court can entertain an action based upon diversity of citizenship without either allegation or proof of such diversity, or allegation or proof that the amount in controversy exceeded \$3000.00, and the plaintiff upon appeal could stay in court because forsooth if the defendant had demurred or had excepted, the complaint or libel could have been amended, and if it had been amended the court would presume that the evidence could and would have been offered.

It is possible that jurisprudence may some time come to a stage when neither pleadings or proof of essential and material facts need be averred or established. We are firmly convinced, however, that the present state of the law will not permit of such a liberal and convenient rule.

The court in its decision suggests that it is supported by the case of *The Oconee*, 280 Fed. 927, and *The Owego*, 292 Fed. 403. Unfortunately, however, neither of these cases are applicable to the case at bar, and do not support, but in fact deny the validity of the position adopted by this court.

The decision in the *Oconee* case merely holds that Subdivisions E and F do not relate to those facts which are essential to give a preferred status to a mortgage and imposes no duty upon the mortgagee, but as to the provisions of subdivisions C and D the court says "certain prerequisites are provided in the Act to be done by the mortgagor or the mortgagee or both in order that the benefits of the provision may accrue—for instance, the vessel *must be* a vessel of the United States of 200 gross tons or upward; the mortgage *must be* endorsed upon the ship's documents; it *must be* recorded as required, together with the time and date when the mortgage is so endorsed; an affidavit of good faith *must be* filed with the mortgage; there *must be* no waiver of the preferred status; and the mortgagee *must not be* an alien. In the case now under consideration it is con-

ceded that all of the requirements just named were duly complied with."

It should be noted that Judge Grier in that decision says that those things are *prerequisites* to the enforcement of the benefits of the Act. A prerequisite, according to the Oxford Dictionary, is that which is required beforehand, a condition previously necessary, and where it is used as an adjective it is "a requisite as a previous condition." In other words, the performance of those things are conditions precedent to the acquisition by the Federal Courts of jurisdiction to foreclose the mortgage.

That Judge Grier's decision is the law is clear from an examination of Subsection D<sup>(a)</sup>, which says:

"A valid mortgage \* \* \* shall in general have, in respect to such vessel, and as of the date of the compliance with all of the provisions in this subdivision, the preferred status given by the provisions of subsection M if

(1) the mortgage is endorsed upon the ship's documents;

(2) is recorded as provided in subsection C;

(3) an affidavit of good faith is filed with the record in the mortgage;

(4) that the mortgage does not contain a waiver of the preferred status;

(5) that the mortgagee is a citizen of the United States.

The only allegation in the pleading is that the trustee is a citizen of the United States, that the mortgage was executed and that it was recorded in the office of the Collector of Customs on 23rd day of March, 1921 in Book G, folio 77. The only evidence of compliance with the statute is that it was so recorded. It is of no importance whether the question of jurisdiction was raised in the court below or not. It can be raised for the first time in the Supreme Court of the United States, because it is jurisdictional. Jurisdiction cannot be conferred by agreement, and if it cannot be conferred by agreement, pleading and proof of it cannot be waived by failure to object or except. The Ship Mortgage Statute may be a liberal statute, and upon that question we offer no denial, but any law which gives a lien is a liberal law, and we know of no case where that fact has permitted a litigant to omit both pleading and proof of those things which entitle him to his lien. Let it be remembered that unless those facts exist he has no lien, preferred or otherwise, and this is strongly impressive when it is remembered that an admiralty court has no jurisdiction to foreclose a ship mortgage unless it is entitled to a preferred status.

Now, let us discuss the Owego case, 292 Fed. 403. An objection was made to the recognition of the mortgage of the New York Trust Co. It does not appear from the decision upon what the objector relied. All the court says upon this subject is: "the object of that statute was to enable the owners of vessels to use the vast capital invested in them with at least a part of the



facility enjoyed by investors in structures on land. But we note the statute is liberal and should be liberally construed, *although all of its provisions as to registry and endorsement on the ships' documents should be complied with.*"

There is no intimation in this decision that a mortgagee, who has not seen to it that the things are done which the statute says must be done in order to give him a preferred status, is entitled to that different status even though he has neither pleaded nor proved a compliance with the statute.

The court evidently lost sight of the fact that the Bankers Discount Corporation does not and never has stood, with regard to the other owners of the ship or the trustee, in the position of the Coast Shipbuilding Company. Long prior to the time that the mortgage to Ransom, Trustee, was discussed among the shareholders, long prior to the time that any mortgage was ever executed or any money loaned, the Bankers Discount Corporation was the owner of the claim of the Coast Shipbuilding Company against the ship. Its loan was made upon the faith of such claim, upon the agreement that the same belonged to it, and that a formal assignment should be made to it as soon as the amount could be ascertained after an adjustment of the Emergency Fleet Corporation. The Coast Shipbuilding Company had no lien to waive, because it belonged to the Bankers Discount Corporation. That arrangement was made during the lifetime of Mr. Harry Pennell.



A formal assignment could not then be executed because the exact amount of the overage could not be ascertained.

The court has again lost sight of the fact that the equities of the case are strongly in favor of the Bankers Discount Corporation. It was their money which enabled the owners of the ship to finish its reconstruction and alteration. It was their \$10,000 which paid the seamen's wages when the ship returned from Australia. It was their money which paid the insurance premiums. All of the shareholders, including those for whom Frank Ransom acted as trustee, were liable for the amount of the Coast Shipbuilding lien. *Gallatin vs. The Pilot*, 9 Fed. Cases, pp. 1100, 1102.

Again the court is in error in deciding that there was a ratification of the waiver by the Coast Shipbuilding Company. The court says "it may be conceded that Green, as secretary and managing officer of the Coast Shipbuilding Company had good authority to waive the company's lien, but the decision of the question here involved does not rest upon the inquiry into the limits of Green's power. The evidence leaves no doubt that the corporation was in *absolute need of money*. *Many efforts had been made to raise it. An attempt had been made to borrow it from a bank as a first mortgage on the ship.*"

The court is under a misapprehension as to the facts. It was not *the corporation* which was in absolute

need of money, *but the ship*. No efforts had been made to raise money for the corporation, but efforts had been made to raise money for the ship. No attempt had been made to borrow money from a bank on a first mortgage on the ship for the benefit of the corporation, but an effort had been made to raise the money from a bank by means of a mortgage on the ship for the benefit of the ship. We will freely concede that if the \$35,000 was a loan to the Coast Shipbuilding Company for its benefit, then the acceptance of the money by the Coast Shipbuilding Company would be an absolute ratification of the waiver by Green. Where, however, the actions of Green were for the ship and not for his corporation, there can be no ratification or estoppel as to the corporation, nor does the fact that Sherwood may have been present at the meeting of the shareholders bind the corporation. As was pointed out, a corporation acts only through an action of its Board of Directors, and even the Board of Directors cannot dispose of or give away the assets of the corporation except upon consideration passing to the corporation.

The action of Green was not for the benefit of his corporation but was against its interests. When the ship returned from its Australian trip it was to the interest of the Coast Shipbuilding Company to have insisted upon the payment of its lien, and if such payment was refused, to have foreclosed it. By foreclosure it would have obtained title to a ship which cost approximately \$400,000 for a lien of approximately \$50,000.00. Mr. Green foregoing his duty to this corpora-

tion and in the interest of the other owners of the ship may have attempted to waive the corporation's lien, but he was without authority. He acted against the interests of the corporation. The corporation received no benefits, did not receive any portion of the \$35,000.00 which went into the coffers of the ship, and not to the benefit of the shipbuilding company.

Again, we urge, inasmuch as Ransom stands simply as a trustee for certain owners of the ship who advanced money for the ship, and therefore for their own benefit, that such a situation can not give rise to a maritime lien, or in fact any kind of a lien. *The Gyda*, 235 Fed. 266; *The Cimbria*, 250 Fed. 271.

In this case we have the Bankers Discount Corporation loaning money to the Coast Shipbuilding Company. It was in fact used by that company in making the alterations and repairs which enabled *The Egeria* to go to sea and in paying her seamen and insurance premiums upon her hull, engines and tackle. This money was loaned to the Coast Shipbuilding Company for the benefit of the vessel and an assignment of its lien given to the Bankers Discount Corporation as security for the loan. The money which the Bankers Discount Corporation now attempts to obtain is money which the shareowners of the ship received the benefits of, and without which the ship could not have gone to sea. After having received the benefits of that money some of the shareowners claim to have advanced moneys *to themselves and to have taken security upon their*

*own property*, and insist that their loan to themselves, secured upon their own property, is a lien prior to that of a stranger which had no interest in the ship. This is contrary to all rules of admiralty, as is shown in the cases last above cited.

Whether a part owner can, under any circumstances, obtain a maritime lien against his own property is not settled, the authorities being in conflict, but it is clear, on principle as well as upon authority, as against a stranger having a maritime lien, no such lien can be enforced by one who is part owner himself for the debt underlying such lien. *Petrie vs. Steam Tug Coal Bluff*, 3 Fed. 531; *Benton*, 3 Fed. Cases, 256, No. 1334.

The court erred upon the question of jurisdiction. The court erred upon the question of ratification. The court erred upon the fact as to the corporation being in need of money and obtaining any portion of the money. The court erred upon its construction of the statute. By these errors it is permitting shareowners or partners to prefer themselves as against other creditors.

A rehearing should be granted, and the errors above referred to corrected.

Respectfully submitted,

WINTER & MAGUIRE,  
Proctors for Bankers Discount Corporation  
and Coast Shipbuilding Company.





United States

13

# Circuit Court of Appeals

For the Ninth Circuit.

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GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Appellant,

vs.

ASTORIA OVERSEAS CORPORATION, a Cor-  
poration, OLOF ANDERSON, O. E. AN-  
DERSON, O. B. SETTERS, T. L. GAUL,  
H. VANCE, LEE DRAKE, R. R. BART-  
LETT, PHILENA BARTLETT, J. FRED  
LARSON, and C. A. NYQUIST,

Appellees.

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## Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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FILED  
1: AUG 14 1923  
FBI - PORTLAND



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Appellant,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON, and C. A. NYQUIST,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the District of Oregon.

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# INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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### **Names and Addresses of Attorneys of Record.**

IRA S. LILLICK, Kohl Building, San Francisco, California, and Platt & Platt, Montgomery & Fales, Platt Building, Portland, Oregon, for the Appellant.

ANDERSON & SETTERS, Astoria, Oregon, for the Appellees.

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In the District Court of the United States for the District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

### **Citation on Appeal.**

To Astoria Overseas Corporation, a corporation, Olof Anderson, O. E. Anderson, O. B. Setters, T. L. Gaul, H. Vance, Lee Drake, R. R. Bartlett, Philena Bartlett, J. Fred Larson and C. A. Nyquist, the above named defendants, and to Anderson & Setters, their solicitors of record.

**Complaint.**

Comes now the plaintiff above named, and for cause of suit against the defendants above named alleges as follows:

**I.**

That during all the times herein mentioned, plaintiff was and still is a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact business in the State of Oregon.

**II.**

That during all the times herein mentioned, defendant, Astoria Overseas Corporation, was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Astoria, State of Oregon.

**III.**

That each of the other defendants above named are stockholders in the defendant, Astoria Overseas Corporation, and the plaintiff is informed and believes, and therefore alleges the fact to be that the number of shares held by each of said defendants, and the amount of their unpaid stock subscriptions, is as follows, to wit:

Olof Anderson	50 shares—50 per cent unpaid;
Melvin Anderson	10 shares—50 per cent unpaid;
O. B. Setters	50 shares—50 per cent unpaid;
T. G. Gaul	25 shares—50 per cent unpaid;
H. Vance	50 shares—50 per cent unpaid;
Lee D. Drake	5 shares—50 per cent unpaid;

R. R. Bartlett  
or Philena

Bartlett....15 shares—10 per cent unpaid;

J. Fred Larson 150 shares—93 per cent unpaid;

C. A. Lynquist 10 shares—45 per cent unpaid;

Each share being of the par value of One Hundred Dollars (\$100.00).

#### IV.

That heretofore, and on the 13th day of September, 1922, a judgment was entered by the Circuit Court of the State of Oregon, for the County of Multnomah, in favor of A. M. Gillespie, Inc., a corporation, and against General Steamship Corporation, a corporation, plaintiff above named, and Astoria Overseas Corporation, a corporation, the defendant above named, in the sum of Four Thousand Ninety-three Dollars, Eighty-two Cents (\$4.093.82), and for the costs incurred in the action wherein said judgment was recovered, which said judgment so entered against the plaintiff, General Steamship Corporation, a corporation, and defendant, Astoria Overseas Corporation, a corporation, was for the recovery of the amount of a trade acceptance drawn by the plaintiff upon the defendant, Astoria Overseas Corporation, and by said defendant accepted, and after said instrument was accepted by the Astoria Overseas Corporation, the plaintiff endorsed said instrument and transferred the same, for value, to the said A. M. Gillespie, Inc., a corporation.

#### V.

That after the entry of said judgment, the said A. M. Gillespie, Inc., a corporation, as the owner

of said judgment, levied an execution upon the account of the plaintiff in the Bank of California at Portland, Oregon, and also levied an execution upon the properties of the Astoria Overseas Corporation, at Astoria, Oregon.

## VI.

That the plaintiff herein was compelled, by virtue of the levy of execution upon its account, to tender to the Sheriff of Multnomah County, Oregon, the sum of Four Thousand, Two Hundred Six Dollars Sixty-four Cents (\$4,206.64) in order to release the levy [5] of execution upon the account of the General Steamship Corporation, a corporation, and on the 2d day of November, 1922, the plaintiff herein did pay to the Sheriff of Multnomah County, Oregon, the sum of Four Thousand, Two Hundred Six Dollars, Sixty-four Cents (\$4,206.64), which sum constituted the amount of the judgment, together with costs and interest, which had been rendered in favor of A. M. Gillespie, Inc., a corporation against General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation, which judgment was duly entered in the judgment records of the Circuit Court of the State of Oregon, for the County of Multnomah.

## VII.

That immediately thereafter, and on the 2d day of November, 1922, the plaintiff herein filed with the Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, a notice of payment of said Four Thousand Two Hundred Six Dollars Sixty-four Cents (\$4,206.64) so paid to the



sheriff of Multnomah County, Oregon, and a claim to contribution from the defendant, Astoria Overseas Corporation, a corporation, all in accordance with Section 243, of Olson's Oregon Laws, and thereafter said notice of payment and claim to contribution was entered by the Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, in the margin of the docket where the judgment rendered in the case of A. M. Gillespie, Inc., a corporation, plaintiff, vs. General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation, defendants, is entered.

#### VIII.

That thereafter, and on the 8th day of November, 1922, the plaintiff above named filed a motion in the Circuit Court of the State of Oregon, for the County of Multnomah, for an order directing the Clerk of the Circuit Court of the State of Oregon, for the County of Multnomah, to issue a writ of execution upon the judgment so [6] rendered in favor of A. M. Gillespie, Inc., a corporation, against said General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation, in favor of the plaintiff above named.

#### IX.

That thereafter, and on the 8th day of November, 1922, the Circuit Court of the State of Oregon, for the County of Multnomah, entered an order directing the issuance of an execution in favor of the plaintiff above named and against the defendant, Astoria Overseas Corporation, a corporation, on that certain judgment rendered by the Circuit

Court of the State of Oregon, for the County of Multnomah, on the 13th day of September, 1922 in favor of A. M. Gillespie, Inc., a corporation, and against General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation, which order was based upon the provisions of Section 243, of Olson's Oregon Laws, and by virtue of said order and the notice of payment and claim to contribution, filed in the manner aforesaid, the plaintiff above named became entitled to enforce against the defendant, Astoria Overseas Corporation, a corporation, that certain judgment theretofore rendered in favor of A. M. Gillespie Inc., a corporation, and against General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation.

#### X.

That on the 21st day of November, 1922, the sheriff of Clatsop County, State of Oregon, made a return upon the execution issued against the defendant, Astoria Overseas Corporation, a corporation, which return showed that said sheriff was unable to find any liquid assets of the defendant Astoria Overseas Corporation, a corporation, or any assets whatsoever out of which the judgment so rendered against the plaintiff and the defendant Astoria Overseas Corporation, a corporation, could be satisfied.

#### XI.

That the plaintiff has made an investigation with reference [7] to the assets of the defendant, Astoria Overseas Corporation, a corporation, and such

Investigation has disclosed that there are no assets of the defendant, Astoria Overseas Corporation, a corporation, out of which the said judgment against the defendant, Astoria Overseas Corporation, a corporation, can be satisfied, except the unpaid stock subscriptions of the various stockholders, defendants above named, a list of which is hereinbefore set forth in Paragraph III of this complaint.

### XII.

That the plaintiff is entitled, under and by virtue of the laws of the State of Oregon, and more particularly Section 243 of Olson's Oregon Laws, to enforce contribution against the defendant, Astoria Overseas Corporation, a corporation, for the payment of the sum of Four Thousand, Two Hundred Six Dollars, Sixty-four Cents (\$4,206.64), which sum was paid by the plaintiff to the sheriff of Multnomah County, Oregon, in order to release the execution levied upon the judgment rendered in favor of A. M. Gillespie, Inc., a corporation, against General Steamship Corporation, a corporation, and Astoria Overseas Corporation, a corporation, by the Circuit Court of the State of Oregon, for the County of Multnomah, which execution was levied against the properties and accounts of the plaintiff herein.

### XIII.

That plaintiff has no plain, speedy or adequate remedy at law, but only in equity.

### XIV.

That this is a controversy between citizens of different States, to wit: the plaintiff is a resident and

inhabitant of the State of Delaware, and the defendants, and each of them, are residents and inhabitants of the State of Oregon, and the amount in controversy exceeds the sum of Three Thousand Dollars (\$3,000.00) exclusive of interest and costs [8]

WHEREFORE, plaintiff prays for a decree of this Court, directing the defendant stockholders, and each of them, to pay into the treasury of the defendant, Astoria Overseas Corporation, the amount of the unpaid balance upon their respective stock subscriptions, and that the respective amounts so paid upon said stock subscriptions be applied in payment of the amount which the plaintiff was compelled to pay in order to release the levy of execution upon the judgment rendered against it and the defendant, Astoria Overseas Corporation to wit, the sum of Four Thousand Two Hundred Six Dollars, Sixty-four Cents (\$4,206.64), and that an injunction be issued by this Court restraining the defendants, and each of them, from making any disposition of the respective shares of stock held by them in the defendant, Astoria Overseas Corporation, a corporation, during the pendency of this suit; and that the defendant, Astoria Overseas Corporation, a corporation, be restrained by injunction from making any disposition of any of the moneys received by it on its unpaid stock subscriptions, during the pendency of this suit, and until further order of this Court; and for an order to show cause why such injunction should not be made permanent; and for a decree against



the defendants, and each of them, in the sum of Four Thousand Two Hundred Six Dollars, Sixty-four Cents (\$4,206.64), together with interest from the 2d day of November, 1922, and for plaintiff's costs and disbursements herein, the total to be paid in proportion to the amount unpaid upon their respective stock subscriptions to the capital stock of the defendant, Astoria Overseas Corporation, a corporation; and for an order requiring the defendant, Astoria Overseas Corporation, a corporation, to produce the records of said corporation showing the full list of unpaid stock subscriptions to the capital stock of said defendant, Astoria Overseas Corporation, a corporation; and that a receiver be appointed to collect such unpaid stock subscriptions; and that a subpoena be issued out of the above-entitled Court to [9] the defendants, and each of them, requiring them to appear before this Court, on a day certain to be named, and answer the complaint herein filed; and for such other and further relief as may to the Court seem equitable and proper.

PLATT & PLATT, MONTGOMERY & FALES,  
Solicitors for Plaintiff.

HUGH MONTGOMERY,  
ROBERT TREAT PLATT,  
Of Counsel.

United States of America,  
District of Oregon,—ss.

I, J. C. Settle, being first duly sworn, depose and say that I am Resident Agent of General Steamship Corporation, a corporation, the plaintiff in the



above-entitled suit, and that I have read the foregoing complaint, and that the same is true, as I verily believe.

J. C. SETTLE.

Subscribed and sworn to before me this 1st day of December, 1922.

[Notarial Seal]

FRANK HALL REEVES,  
Notary Public in and for the State of Oregon.  
My Commission expires July 28, 1926.

Filed December 2, 1922. G. H. Marsh, Clerk. [10]

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AND AFTERWARDS, to wit, on the 24th day of February, 1923, there was duly filed in said Court, an Amended Answer, in words and figures as follows, to wit: [11]

In the District Court of the United States for the District of Oregon.

No. E-8626.

GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON, and C. A. NYQUIST,

Defendants.

**Amended Answer.**

Come now the defendants above named and for answer to plaintiff's complaint admits, denies and alleges as follows:

**I.**

Admits that all of the defendants above named are stockholders of the "Astoria Overseas Corporation," a corporation, alleged in paragraph three (3) of plaintiff's complaint, but denies the *pro rata* unpaid of each stockholder as alleged in said paragraph three (3) and alleges the facts to be as follows, to wit:

Olof Anderson, amount unpaid . . . .	\$2242.50
O. E. Anderson, amount unpaid . . . .	700.00
Philena Bartlett, amount unpaid . . . .	375.00
Lee D. Drake, amount unpaid . . . .	250.00
T. L. Gaul, amount unpaid . . . . .	1500.00
J. Fred Larson, amount unpaid . . . .	13500.00
C. A. Nyquist, amount unpaid . . . . .	400.00
W. H. Vance, amount unpaid . . . . .	4000.00
O. B. Setters, amount unpaid . . . . .	1845.50

**II.**

Admits that on the 13th day of September, 1922, a judgment was entered by the Circuit Court of the State of Oregon for the County of Multnomah, in favor of the A. M. Gillespie Company, Inc., a corporation and against the General Steamship Corporation, a corporation, in the sum of Four Thousand Ninety-three Dollars Eighty-two Cents (\$4093.-82), and for costs incurred in the action [12] as alleged in paragraph Four (4) of plaintiff's complaint, but denies each and every allegation, matter

and thing contained in paragraph Four (4) not herein admitted.

### III.

Admits paragraph Five (5) of plaintiff's complaint.

### IV.

Denies paragraph Six (6) of plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

### V.

Denies paragraph Seven (7) of plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

### VI.

Admits paragraph Eight (8) of plaintiff's complaint.

### VII.

Admits paragraph Nine (9) of plaintiff's complaint.

### VIII.

Admits paragraph Ten (10) of plaintiff's complaint.

### IX.

Admits paragraph Eleven (11) of plaintiff's complaint.

### X.

Denies paragraph Twelve (12) of plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

For a Further Separate Answer and Defense Defendants Allege:

I.

That during all of the times herein mentioned, [13] plaintiff was and still is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact business in the State of Oregon.

II.

That during all of the times herein mentioned, defendant Astoria Overseas Corporation, was a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Astoria, Clatsop County, State of Oregon.

III.

That during the month of July, 1921, the defendant Astoria Overseas Corporation, became indebted to the Astoria National Bank in the sum of Five Thousand Dollars (\$5,000.00), in the way of securing a loan from said bank, and pledged to the said bank, the then unpaid subscriptions as security to the said bank for the payment of same, and the said sum of Five Thousand Dollars (\$5,000.00) has not been paid, and there is now due and owing said bank by the Astoria Overseas Corporation the full sum of Five Thousand Dollars (\$5,000.00), which said security has never been released by the said bank and is still a first lien against the subscriptions and all of them.



## IV.

That the said Astoria Overseas Corporation ceased to function on the first day of June, 1922, and has not transacted any business since that time, and at the said time placed all of its affairs in the hands of O. B. Setters as trustee for the purpose of liquidating its liabilities and that the said O. B. Setters in turn placed all of the assets of the Astoria Overseas Corporation into the hands of the Astoria National Bank to be held in trust for the [14] creditors of the Astoria Overseas Corporation, and which assets of the Astoria Overseas Corporation consist as follows, to wit:

## STOCKHOLDER LIABILITIES.

Olof Anderson, amount unpaid.....	\$2242.50
O. E. Anderson, amount unpaid .....	700.00
Philena Bartlett, amount unpaid....	375.00
Lee D. Drake, amount unpaid .....	250.00
T. L. Gaul, amount unpaid .....	1500.00
J. Fred Larson, amount unpaid ....	13500.00
C. A. Nyquist, amount unpaid .....	400.00
W. H. Vance, amount unpaid .....	4000.00
O. B. Setters, amount unpaid.....	1845.50

and Seventy (70) shares of stock in the Pacific Overseas Corporation.

The liabilities of the Astoria Overseas Corporation, other than the plaintiff's claim are as follows, to wit:

Astoria National Bank .....	\$5000.00
Spokesman Review Company .....	15.00
Radio of America .....	210.01
Silver Falls Timber Company .....	1642.44



J. T. Steeb & Company .....	28.36
McBain & Company .....	316.50
G. W. Walters .....	15.00
Chinese American Product Company	24.00
Postal Telegraph Company .....	162.87
Cohn Drafts .....	9193.00
Egerton Burnett Company dated De- cember 20, 1922, 13.56 pounds.	—————

That the said Astoria Overseas Corporation is insolvent in that some of its stockholders are insolvent and cannot pay their subscriptions, and that said Astoria Overseas Corporation should be declared a Bankrupt by this Court and the assets of the Corporation liquidated, and each of the creditors of the said Corporation receive *pro rata* their share of the assets after payment of the Five Thousand Dollars (\$5,000.00) due the Astoria National Bank.

WHEREFORE, defendants pray that the plaintiffs take nothing herein, and that the Astoria Overseas Corporation be declared a bankrupt and a receiver appointed for the benefit of all of the [15] creditors of the Astoria Overseas Corporation, and that the claim of the General Steamship Corporation *pro rata* in the assets with the remaining creditors.

ANDERSON & SETTERS,  
Attorneys for Defendants.

State of Oregon,  
County of Clatsop,—ss.

I, O. B. Setters, being first duly sworn, depose and say that I am one of the defendants in the

above-entitled suit, and that the foregoing amended complaint is true as I verily believe.

O. B. SETTERS.

Subscribed and sworn to before me this 21st day of February, 1923.

OLOF ANDERSON,

The words

Notary Public for Oregon.

[Notarial Seal]

written in.

My commission expires January 10, 1925.

State of Oregon,

County of Clatsop,—ss.

I, O. B. Setters, one of defendants' Attorneys, do hereby certify that I have prepared the foregoing copy of Amended Answer, and have carefully compared the same with the original thereof, and that it is a correct transcript therefrom and of the whole thereof.

That the said — in my opinion is well founded in law.

— Oregon, dated the 21st day of February, 1923.

O. B. SETTERS.

Filed February 24, 1923. G. H. Marsh, Clerk.

[16]

AND AFTERWARDS, to wit, on the 22d day of March, 1923, there was duly filed in said Court, a Second Amended Answer, in words and figures as follows, to wit: [17]

In the District Court of the United States for the District of Oregon.

No. E-8626.

GENERAL STEAMSHIP CORPORATION, a Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE D. DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

**Second Amended Answer.**

Come now the defendants above named and for answer to plaintiff's complaint admits, denies and alleges as follows:

**I.**

Admits that all of the defendants above named are stockholders of the "Astoria Overseas Corporation," a corporation, alleged in paragraph three (3) of plaintiff's complaint, but denies the *pro rata* unpaid of each stockholder as alleged in said paragraph

three (3), and alleges the facts to be as follows, to wit:

Olof Anderson amount unpaid.....	\$2242.50
O. E. Anderson amount unpaid .....	700.00
Philena Bartlett amount unpaid ....	375.00
Lee D. Drake amount unpaid .....	250.00
T. L. Gaul amount unpaid .....	1500.00
J. Fred Larson amount unpaid .....	13500.00
C. A. Nyquist amount unpaid .....	400.00
W. H. Vance amount unpaid .....	4000.00
O. B. Setters amount unpaid .....	1725.50

## II.

Admits that on the 13th day of September, 1922, a judgment was entered by the Circuit Court of the State of Oregon for the County of Multnomah in favor of the A. M. Gillespie Company, Inc., a corporation and against the General Steamship Corporation, a corporation, in the sum of Four Thousand Ninety-three dollars eighty-two Cents (\$4,093.-82), and for costs incurred in the action as alleged in paragraph four (4) of plaintiff's complaint, but denies each and every allegation, matter and thing contained in paragraph Four (4) not herein admitted. [18]

## III.

Admits paragraph Five (5) of plaintiff's complaint.

## IV.

Denies paragraph Six (6) of plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

V.

Denies paragraph Seven (7) of the plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

VI.

Admits paragraph Eight (8) of plaintiff's complaint.

VII.

Admits paragraph Nine (9) of plaintiff's complaint.

VIII.

Admits paragraph Ten (10) of plaintiff's complaint.

IX.

Admits paragraph Eleven (11) of plaintiff's complaint.

X.

Denies paragraph Twelve (12) of plaintiff's complaint upon the grounds and for the reason that these answering defendants have no knowledge, information or belief that the same is true.

For a further separate answer and defense defendants allege:

I.

That during all of the times herein mentioned plaintiff was and still is a corporation, duly incorporated, organized and existing under and by virtue of the laws of the State of Delaware, and authorized to transact business in the State of Oregon.

II.

That during all of the times herein mentioned de-



fendant, [19] “Astoria Overseas Corporation,” was a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, with its principal office and place of business in the City of Astoria, Clatsop County, State of Oregon.

### III.

That during the month of July, 1921, the defendant “Astoria Overseas Corporation,” became indebted to the “Astoria National Bank” in the sum of Five Thousand Dollars (\$5,000.00), in the way of securing a loan from said bank, and pledged to the said bank the then unpaid subscriptions as security to said bank for the payment of same, and the said sum of Five Thousand Dollars (\$5,000.00) has not been paid, and there is now due and owing said bank from the “Astoria Overseas Corporation” the full sum of Five Thousand Dollars (\$5,000.00), which said security has never been released by the said bank and is still a first lien against the subscriptions and all of them.

### IV.

That the said “Astoria Overseas Corporation” ceased to function on the first day of June, 1922, and has not transacted any business since that time, and at the said time placed all of its affairs in the hands of O. B. Setters as trustee, for the purpose of liquidating its liabilities and that the said O. B. Setters in turn placed all of the assets of the “Astoria Overseas Corporation” into the hands of the “Astoria National Bank” to be held in trust for the creditors of the “Astoria Overseas Corporation,”

and which assets of the “Astoria Overseas Corporation” consist as follows, to wit:

STOCKHOLDERS’ LIABILITIES.

Olof Anderson amount unpaid . . . . .	\$2242.50
O. E. Anderson amount unpaid . . . . .	700.00
Philena Bartlett amount unpaid . . . . .	375.00
Lee D. Drake amount unpaid . . . . .	250.00
T. L. Gaul amount unpaid . . . . .	1500.00
J. Fred Larson amount unpaid . . . . .	13500.00
C. A. Nyquist amount unpaid . . . . .	400.00
W. H. Vance amount unpaid . . . . .	4000.00
O. B. Setters amount unpaid . . . . .	1725.50
and Seventy (70) shares of stock in	

the “Pacific Overseas Corporation.” [20]

The liabilities of the “Astoria Overseas Corporation” other than the plaintiff’s claim are as follows, to wit:

Astoria National Bank . . . . .	\$5000.00
Spokesman Review Company . . . . .	15.00
Radio of America . . . . .	210.01
Silver Falls Timber Co. . . . .	1642.44
J. T. Steeb & Co. . . . .	28.36
McBain & Co. . . . .	316.50
G. W. Walters . . . . .	15.00
Chinese American Products Co. . . . .	24.00
Cohn Drafts . . . . .	162.87

Edgerton Burnett Co. dated December  
20th, 1922—13.56 lbs.

That the said “Astoria Overseas Company” is insolvent in that some of its stockholders are insolvent and cannot pay their subscriptions, and that the assets of the Corporation should be liquidated, and

each of the creditors of the said corporation receive *pro rata* their share of the assets after the payment of the Five Thousand Dollars (\$5,000.00) due the Astoria National Bank.

WHEREFORE, defendants pray that the plaintiff take nothing herein and that a Receiver be appointed for the benefit of all of the creditors of the "Astoria Overseas Corporation," and that the claim of the General Steamship Corporation *pro rata* in the assets with the remaining creditors herein set forth after the payment of the Five Thousand Dollars (\$5,000.00) to the Astoria National Bank.

ANDERSON & SETTERS,  
Attorneys for Defendants.

State of Oregon,  
County of Clatsop,—ss.

I, O. B. Setters, being first duly sworn, depose and say that I am one of the defendants in the above-entitled suit, and that the foregoing 2d amended answer is true as I verily believe.

O. B. SETTERS.

Subscribed and sworn to before me this 20th day of March, 1923.

[Notarial Seal]

OLOF ANDERSON,

Notary Public for Oregon.

My commission expires Jan. 10, 1925.

Filed March 22, 1923. G. H. Marsh, Clerk. [21]

AND AFTERWARDS, to wit on Monday, the 21st day of May, 1923, the same being the 64th judicial day of the regular March term of said Court, Present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [22]

In the District Court of the United States for the  
District of Oregon.

May 21, 1923.

No. E-8626.

GENERAL STEAMSHIP COMPANY,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE D. DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST.

**Minutes of Court—May 21, 1923—Trial Decree.**

This cause was heard by the Court upon the pleadings and the proofs, plaintiff appearing by Mr. Hugh Montgomery and Mr. Arthur Platt, of counsel, and defendants by Mr. O. B. Setters, of counsel, and the Court, having heard the evidence adduced and the arguments of counsel, upon consideration thereof,

IT IS ORDERED, ADJUDGED and DECREED that the complaint herein be and the same is hereby



dismissed, that plaintiff take nothing by this action, and that defendants do have and recover of and from said defendants their costs and disbursements herein taxed in the sum of \$——, and that defendants have execution therefor.

R. S. BEAN,  
Judge. [23]

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AND AFTERWARDS, to wit, on the 21st day of May, 1923, there was duly filed in said Court, an opinion in words and figures as follows, to wit:  
[24]

In the District Court of the United States for the  
District of Oregon.

March 21, 1923.

GENERAL STEAMSHIP COMPANY, a Corporation,  
Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, et al.,  
Defendants.

**Opinion.**

R. S. BEAN, District Judge (Oral).—The suit of the General Steamship Corporation against the Overseas Corporation is a suit brought by a judgment creditor against the stockholders of the defendant corporation to require them to account to the plaintiff for the unpaid subscriptions to its stock. The facts are, and there is no controversy



about them, that the Overseas Corporation was organized sometime in 1920 and ceased to function in June, 1922. On July 1, 1921, it borrowed \$5000 from the bank in Astoria, and by resolution of the directors the unpaid subscriptions to the capital stock were pledged to the bank as security for this note. At that time the company was not indebted in any sum other than this \$5000. In June of 1922, the corporation ceased to function and made an assignment and transfer of its assets to Mr. Setter for the benefit of the creditors. Thereafter in September, 1922, the plaintiff recovered this judgment.

The plaintiff argues, first, that the attempted assignment or transfer by the directors of the corporation to the Astoria Bank of the unpaid and uncalled for stock subscriptions was void for want of authority in the Board of Directors to make such transfer, and the general rule seems to be that the unpaid and uncalled for subscriptions to the capital stock of a company cannot be sold or pledged by the corporation, but it is equally as well settled, as I take it, that that may be done by consent of the stockholders, [25] and in this case the stockholders are consenting. They have appeared in court here and insisted upon the validity of that transfer and are making that defense to this action, and they must have consented to the transfer, and in my judgment it is valid under the circumstances. So likewise with the transfer of the assets of the corporation to Mr. Setter as trustee for the benefit of the creditors; that is also ratified and approved

by the parties to this suit and I can conceive of no valid objection to it.

So I take it that under the record in this case and under the undisputed facts, the bill should be dismissed.

Filed, May 21, 1923. G. H. Marsh, Clerk. [26]

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AND AFTERWARDS, to wit, on the 23d day of July, 1923, there was duly filed in said Court, a statement of the evidence, in words and figures as follows, to wit: [27]

In the District Court of the United States for the District of Oregon.

GENERAL STEAMSHIP CORPORATION, a corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

### **Stipulation Re Evidence.**

It is hereby stipulated by and between the parties herein through their respective attorneys of record. Platt & Platt, Montgomery and Fales for the plain-

tiff and O. B. Setters for the defendants that the within is a correct transcript of evidence and may constitute the record on appeal.

PLATT & PLATT, MONTGOMEY & FALES,  
Solicitors for the Appellants.

O. B. SETTERS,  
Solicitor for the Respondents.

Filed July 23, 1923. G. H. Marsh, Clerk. [28]

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In the District Court of the United States for the  
District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

**Transcript of Evidence.**

This cause came on to be heard on Friday, the 27th day of April, 1923, at the hour of ten o'clock A. M. before the Honorable Robert S. Bean, Judge of the above-entitled Court, plaintiff appearing by Hugh Montgomery of Platt & Platt, Montgomery

& Fales, its attorneys, and the defendants appearing by Anderson & Setters, their attorneys, and the following proceedings were had:

At the beginning of the trial, counsel for the defendants admitted in open court the existence of the judgment which the plaintiff sought to enforce against the defendants, and also admitted the levy of execution thereon, and admitted that a claim for contribution from the defendants had been filed by the plaintiff under and in accordance with Section 243 of the Oregon Code, which claim was for the amount of the judgment.

Counsel for the defendants also admitted in open court, paragraph XII of the complaint filed by the plaintiff.

Counsel for the defendants also admitted in open court, paragraph VI of the complaint.

Counsel for the defendants also admitted in open court that the original judgment entered against the defendant, Astoria Overseas Corporation, and in favor of the plaintiff, had never been appealed from by either party.

Counsel for the defendants also stated in open court that the only issue involved in the trial was the disposition [29] of the assets of the Astoria Overseas Corporation, or, in other words, the liquidating of the liabilities of the corporation, and further stated that during the life of the corporation he, Mr. O. B. Setters, one of the counsel for the defendants, had been the Secretary of the corporation.

All of the material allegations of the complaint filed by the plaintiff were admitted by the judicial



admissions of counsel for the defendants, made in open court, and thereupon Mr. O. B. Setters, as the principal witness, testified as follows:

That the defendant corporation was organized in the fall of 1920 and functioned until June 1st, 1922. That the stockholders of the corporation subscribed for the bigger portion of the stock, and paid a portion of the subscription at the time. That in July, 1921, it became necessary for the company to borrow \$5,000. That the company at that time had no other liabilities, and its assets were the unpaid subscriptions of the stockholders of the corporation. That arrangements were made with the Astoria National Bank to borrow the \$5,000 on condition that the Board of Directors endorsed the note for \$5,000 which they did, and on the further condition that the unpaid stock subscriptions of the stockholders be assigned to the Astoria National Bank for the purpose of additional security, and by resolution of the corporation made by the Board of Directors at the time this loan was made, the unpaid stock subscriptions of the corporation were assigned to the Astoria National Bank. That on December 8th, 1922, the Astoria fire destroyed the records of the corporation, which were in Mr. Setters' office, and that he saved nothing, and was testifying from memory and from the records at the bank after the fire, in connection with this transaction. That the stock was not issued because it was not paid for, and the company only issued stock to the amount that was paid by the stockholders at the time of the incorporation, and the subscriptions



remained intact subject [30] to the call of the Board of Directors. That part of the records in the bank were also in the fire, but the note of the corporation of \$5,000 together with a list of stockholders or unpaid stock subscriptions which were attached to the note were secured from the bank showing the amount unpaid and the unpaid stock subscriptions outstanding at the time of the trial of this case.

Olof Anderson .....	\$2242.00
O. E. Anderson .....	700.00
Philena Bartlett .....	375.00
L. D. Drake .....	250.00
T. L. Gaul .....	1500.00
J. Fred Larsen .....	13500.00
C. A. Nyquist .....	400.00
W. H. Vance .....	4000.00
O. B. Setters .....	1725.50

That the defendant corporation became very heavily involved, and by June 1st or the latter part of May, 1922, the Board of Directors closed or stopped the functioning of the corporation, and the assets of the corporation were, by resolution of the Board of Directors, assigned to O. B. Setters as Trustee, and these assets, being in the hands of the Astoria National Bank and the only assets of the defendant corporation, were the unpaid stock subscriptions. That this litigation and other litigations came up, and no effort has been made to make any collections on the stock subscriptions until the final result of the present suit. That at the commencement of this suit, the complaint asked for a

restraining order preventing further collections on the stock subscriptions, and no action was taken. That the claim of the Astoria National Bank and the \$5,000 note against the Astoria Overseas Corporation has never been satisfied, and there is considerable interest due that has not been paid, running the claim up to possibly \$5,300, which the Astoria National Bank holds the subscriptions as security for the payment of this note of \$5,000. That there are, in addition to the claim of the plaintiff in this case, liabilities of the [31] corporation as follows:

At this juncture, and objection was interposed to the evidence of other liabilities upon the ground that the creditors are not parties to the present controversy, and that it is no defense to a suit of the kind involved in the case at bar for the defendant, Astoria Overseas Corporation or its stockholders in a suit seeking to have the amount of their unpaid stock subscriptions applied to the satisfaction of this judgment, to set forth the claims of other creditors not parties to this suit.

Over said objection, the following items were interposed:

Astoria National Bank .....	\$5,000.00
Spokesman Review .....	15.00
Radio of America .....	210.01
Silver Falls Timber Company ..	1,643.44
Without accrued interest	
J. T. Steeb & Company .....	28.36
McBain & Company .....	316.50

G. W. Walters .....	15.00
Chinese-American Product Co...	24.00
Cohn Drafts—	

That the total disbursements should be nine thousand and some odd dollars. That Egerton Burnett Company 13.56# (that is English money). That there is a claim of upwards of nine hundred dollars which the Astoria Flour Mills has against the company, which is in question. That there is the total of the liabilities of the corporation. That the present stockholders are practically all insolvent, and the creditors would realize very little at the outside if the total amount received was prorated among all the creditors. That the assignment of the corporation, which was made at a time there were no liabilities save and except this \$5,000 of the bank, was made in good faith by the Board of Directors to the Astoria National Bank for the purpose of securing said liability, and the liabilities which are enumerated in the defendants' answer as listed by O. B. Setters were all contracted months after this assignment was made to the bank, and became a liability against the company [32] the latter part of the year 1921 and up to the 1st of June, 1922. That the sum of \$4,206.64 with costs, being the amount of the judgment sued on in this case, has never been paid by the Astoria Overseas Corporation to the General Steamship Corporation. That the assignment to the bank was prior to all the other items of indebtedness to which the witness testified. That the witness was secretary and treasurer of the Astoria Overseas Corporation from

its inception to the 1st of June, 1922, and that the statements of the witness are based upon facts obtained during the time that he was officer of the corporation, and that the records of the Astoria Overseas Corporation were all destroyed including the stock certificate book, the journals, ledgers and all other documents which were kept during the time of the operation of the defendant corporation. That the assignment to the Astoria National Bank was the assignment of the stock subscription list, of each individual stockholder of the Astoria Overseas Corporation.

**Testimony of B. F. Stone, for Defendants.**

B. F. STONE was called as a witness on behalf of defendants, and testified that he was President and Director of the Astoria Overseas Corporation from its inception until the 1st of June, 1922. That he had heard the testimony of Mr. O. B. Setters and that the same was a correct statement. That he was present at a meeting of the Board of Directors of the defendant corporation about July 1st, 1921, when the corporation, through its Board of Directors, borrowed \$5,000 from the Astoria National Bank, and assigned to the Astoria National Bank the unpaid stock subscriptions as a matter of security for the payment of the \$5,000 note, and was present when the Board of Directors adopted a resolution making such assignment. That such was a true statement of the making of the assignment, and the endorsement of the note, and that the witness was one of the endorsers of the note. That



(Testimony of B. F. Stone.)

to the knowledge of the witness there were no outstanding liabilities of the defendant corporation at the time of the said assignment to the Astoria National [33] Bank. That the witness is a Director of the Astoria National Bank, and that the said \$5,000 note was not paid up until the day before the trial of this case. That there is still a liability of \$5,000 in favor of the Astoria National Bank. That the note is still in the hands of the bank. That there were five endorsers on the note. That these endorsements were all an individual liability, and not as officers of the Astoria Overseas Corporation. That there had been a loss of quite a material amount on a shipment of lumber to Honolulu, and the party to whom the draft was drawn had received the lumber, and didn't pay the draft which resulted in a material loss, necessitating the loan of said \$5,000.

**Testimony of R. R. Bartlett, for Defendants.**

Thereupon, R. R. BARTLETT was called as a witness on behalf of the defendants, who testified as follows:

It was stipulated between counsel for the plaintiff and defendants that the testimony of the witness would be corroborative of the testimony of O. B. Setters.

It was stipulated between counsel for the respective parties that if the bookkeeper for the Astoria Overseas Corporation was called to the stand that she would testify that the list of creditors shown



(Testimony of R. R. Bartlett.)

in the answer of the defendants and on the list used by Mr. Setters in his testimony, constituted a correct list of the creditors of the Astoria Overseas Corporation on the 1st day of June, 1922, and that the said bookkeeper if called to the stand would testify as to the amount of the unpaid stock subscriptions of the Astoria Overseas Corporation as being the amount set forth in the answer of the defendants.

Thereupon the defendants rested. [34]

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**Certificate of Judge.**

I. Robert S. Bean, Judge of the United States District Court for the District of Oregon, and the Judge who tried the within-entitled cause, do hereby certify that the above and foregoing statement contains all the evidence introduced upon the trial of said cause, and all of the exhibits introduced upon the trial of said cause, and that said statement is hereby settled and allowed as the statement on appeal in the above-entitled suit.

July 23, 1923.

R. S. BEAN,  
Judge.

Filed July 23, 1923. G. H. Marsh, Clerk. [35]

AND AFTERWARDS, to wit, on the 23d day of July, 1923, there was duly filed in said court, a petition for appeal, in words and figures as follows, to wit: [36]

In the District Court of the United States for the  
District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

### **Petition for Appeal.**

To the Honorable Judges of the Circuit Court of Appeals for the Ninth Circuit.

Comes now the plaintiff above named by his solicitors, and complains that in the record and proceedings, as also in the rendition of the decree of the United States District Court for the District of Oregon in the above-entitled cause on the 21st day of May, 1923, manifest error has intervened to the great damage of the petitioner;

The above plaintiff conceiving itself aggrieved by the decree made and entered in the above-entitled court and cause on the 21st day of May, 1923, it has hereby appealed from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith.

WHEREFORE, the plaintiff prays that an appeal be allowed it in the above-entitled cause, directing the Clerk of the District Court of the United States for the District of Oregon to send the record and proceedings in said cause, with all things concerning the same, to the Circuit Court of Appeals for the Ninth Circuit, in order that the error complained of in the assignment of errors filed herewith by the plaintiff may be *renewed*, and if error be found, corrected.

IRA S. LILLYCK,  
PLATT & PLATT,  
MONTGOMERY & FALES,  
Solicitors for Plaintiff.

Filed July 23, 1923. G. H. Marsh, Clerk. [37]

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AND AFTERWARDS, to wit, on the 23d day of July, 1923, there was duly filed in said court, an assignment of errors, in words and figures as follows, to wit: [37a]

In the District Court of the United States for the  
District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Cor-  
poration, OLOF ANDERSON, O. E. AN-  
DERSON, O. B. SETTERS, T. L. GAUL,  
H. VANCE, LEE DRAKE, R. R. BART-  
LETT, PHILENA BARTLETT, J. FRED  
LARSON and C. A. NYQUIST,

Defendants.

### **Assignment of Errors.**

Comes now the plaintiff, appearing by Ira S. Lillick and by Messrs. Platt & Platt, Montgomery & Fales, its attorneys of record, and says in the record and proceedings herein there is manifest error and assigns error as follows:

#### **I.**

The Trial Court erred in holding that the assignment of the stock subscription list of the Astoria Overseas Corporation to the Astoria National Bank was a valid assignment, and took precedence over the judgment held by the plaintiff.

#### **II.**

The Court erred in refusing to hold that the unpaid and uncalled stock subscriptions to the Asto-

ria Overseas Corporation could not be sold and assigned or mortgaged by the corporation.

III.

The Court erred in holding that the assignment of all the assets of the Astoria Overseas Corporation to O. B. Setters as Trustee was a valid assignment.

IV.

The Court erred in refusing to hold that the Board of Directors of the Astoria Overseas Corporation could not legally assign all of its assets to O. B. Setters as Trustee.

V.

The Court erred in refusing to hold that the plaintiff, as a judgment creditor of the Astoria Overseas Corporation, had a [38] right to bring the present action without joining the other creditors.

VI.

The Court erred in refusing to hold that a receiver could not be appointed as prayed for by the prayer of the answer filed on behalf of the defendants.

VII.

The Court erred in refusing to hold that the plaintiff was entitled to a decree requiring the stockholders of the defendant, Astoria Overseas Corporation, to pay into court the amount of their unpaid stock subscriptions, and further erred in refusing to hold that the plaintiff was entitled to a decree applying the amount of said unpaid sub-



scriptions in satisfaction of the judgment held by the plaintiff.

IRA S. LILICK,  
PLATT & PLATT,  
MONTGOMERY & FALES,  
Solicitors for Plaintiff.

Filed July 23, 1923. G. H. Marsh, Clerk. [39]

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AND AFTERWARDS, to wit, on Monday, the 23d day of July, 1923, the same being the 19th judicial day of the regular July term of said court, present the Honorable ROBERT S. BEAN, United States District Judge, presiding,—the following proceedings were had in said cause, to wit: [40]

In the District Court of the United States for the District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

**Order Allowing Appeal.**

IT IS HEREBY ORDERED that the appeal in the above-entitled cause to the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed as prayed, and

IT IS FURTHER ORDERED, that the plaintiff give a bond in the sum of Five Hundred Dollars (\$500), which shall act as a supersedeas bond.

Dated this, the 23d day of July, 1923.

R. S. BEAN,  
District Judge.

Filed July 23, 1923. G. H. Marsh, Clerk. [41]

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AND AFTERWARDS, to wit, on the 23d day of July, 1923, there was duly filed in said court, a bond on appeal, in words and figures as follows, to wit: [42]

In the District Court of the United States for the  
District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a  
Corporation,  
Plaintiff,

vs

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,  
Defendants.

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS: That we, General Steamship Corporation, as principal, and National Surety Company a corporation of New York, authorized to transact a surety business in the State of Oregon, as surety, are held and firmly bound to the defendants above named in the full sum of Five Hundred Dollars (\$500) to be paid to said defendants, or any of them, to the payment of which well and truly to be made we bind ourselves, our successors in interest and assigns jointly and severally by these presents.

Sealed with our seals this 21st day of July, 1923.

WHEREAS, the plaintiff in the above-entitled suit is prosecuting an appeal to the Circuit Court of Appeals for the Ninth Circuit, to reverse the decree rendered and entered in said cause in the United States District Court for the District of Oregon on the — day of May, 1923;

NOW, THEREFORE, the condition of this obligation is such that if said plaintiff shall prosecute said appeal to effect and answer all damages and costs, if it fails to make said appeal [43] good, then this obligation shall be void; otherwise to remain in full force and effect.

GENERAL STEAMSHIP CORPORATION.

By Platt & Platt, Montgomery & Fales,

Solicitors of Record.

NATIONAL SURETY COMPANY.

By H. C. Leigh,

Attorney in Fact.

Countersigned at Portland, Oregon, under date of July 21, 1923.

[Seal]

By G. E. THATCHER,  
Resident Agent.

Approved:

R. S. BEAN,  
United States District Judge.

Filed July 23, 1923. G. H. Marsh, Clerk. [44]

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AND AFTERWARDS, to wit, on the 23d day of July, 1923, there was duly filed in said court, a praecipe for transcript, in words and figures as follows, to wit: [45]

In the District Court of the United States for the District of Oregon.

No. 8626.

GENERAL STEAMSHIP CORPORATION, a Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Corporation, OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

**Praecipe for Transcript of Record.**

To the Clerk of the Above-entitled Court.

Please issue a certified transcript of the record in your court in the above-entitled case, to the Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

- (1) Copy of statement of evidence.
- (2) Decree of the Court.
- (3) Complaint.
- (4) Amended answer.
- (5) Second amended answer.
- (6) Petition for appeal.
- (7) Bond on appeal.
- (8) Order allowing appeal.
- (9) Citation on appeal.

PLATT & PLATT,  
MONTGOMERY & FALES,  
Solicitors for Appellant. [46]

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In the District Court of the United States for the  
District of Oregon.

GENERAL STEAMSHIP CORPORATION, a  
Corporation,

Plaintiff,

vs.

ASTORIA OVERSEAS CORPORATION, a Cor-  
poration, OLOF ANDERSON, O. E. AN-  
DERSON, O. B. SETTERS, T. L. GAUL,



H. VANCE, LEE DRAKE, R. R. BARTLETT, PHILENA BARTLETT, J. FRED LARSON and C. A. NYQUIST,

Defendants.

**Stipulation Re Transcript of Record.**

It is hereby stipulated by and between the parties hereto through their respective attorneys of record, Platt & Platt, Montgomery & Fales for the plaintiff and O. B. Setters for the defendants, that the requested certified transcript of the solicitors for the appellant may constitute when issued, the certified transcript for appeal in this cause.

PLATT & PLATT,

MONTGOMERY & FALES,

Solicitors for the Appellant.

O. B. SETTERS,

Solicitor for the Respondents.

Filed July 23, 1923. G. H. Marsh, Clerk. [47]

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**Certificate of Clerk U. S. District Court to Transcript of Record.**

United States of America,  
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered from 3 to 47 inclusive, constitute the transcript of record on appeal from the final decree of said court in the same in which the General Steamship Corporation, a corporation, is plaintiff and appellant, and the Astoria Overseas Corporation, a cor-

poration, Olof Anderson, O. E. Anderson, O. B. Setters, T. L. Gaul, H. Vance, Lee Drake, R. R. Bartlett, Philena Bartlett, J. Fred Larson and C. A. Nyquist are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by the said appellant, and it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe, as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is \$11.35, and that the same has been paid by the said appellant.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said District, this 27th day of July, 1923.

[Seal]

G. H. MARSH,  
Clerk.

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[Endorsed]: No. 4068. United States Circuit Court of Appeals for the Ninth Circuit. General Steamship Corporation, a Corporation, Appellant, vs. Astoria Overseas Corporation, a Corporation, Olof Anderson, O. E. Anderson, O. B. Setters, T. L. Gaul, H. Vance, Lee Drake, R. R. Bartlett, Philena Bartlett, J. Fred Larson, and C. A. Nyquist, Appellees. Transcript of Record. Upon

Appeal from the United States District Court for  
the District of Oregon.

Filed July 30, 1923.

F. D. MONCKTON,  
Clerk of the United States Circuit Court of Ap-  
peals for the Ninth Circuit.

By Paul P. O'Brien,  
Deputy Clerk.



No. 4068

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GENERAL STEAMSHIP CORPORATION  
(a corporation),

*Appellant,*

vs.

ASTORIA OVERSEAS CORPORATION (a corporation), OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, and D. A. NYQUIST,  
*Appellees.*

## BRIEF FOR APPELLANT.

IRA S. LILLYCK,  
PLATT & PLATT,  
MONTGOMERY & FALES,  
*Solicitors for Appellant.*

FILED

APR 2 1911

WILLIAMSON





No. 4068

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GENERAL STEAMSHIP CORPORATION  
(a corporation),

*Appellant,*

vs.

ASTORIA OVERSEAS CORPORATION (a corporation), OLOF ANDERSON, O. E. ANDERSON, O. B. SETTERS, T. L. GAUL, H. VANCE, LEE DRAKE, R. R. BARTLETT, and D. A. NYQUIST,  
*Appellees.*

## BRIEF FOR APPELLANT.

### Statement of Case.

This is a suit in equity instituted by the appellant against the appellees to compel the stockholders of the Astoria Overseas Corporation to contribute the amount due upon their respective unpaid stock subscriptions in satisfaction of a judgment held by the appellant against the said corporation.

The existence of the judgment in favor of the appellant and the facts upon which the judgment was based are admitted by the answer of the appellees, but a brief review of these facts is essential

to a correct understanding of the issues involved in the present controversy.

On the 13th of September, 1922, a judgment was entered by the Circuit Court of the State of Oregon, for the County of Multnomah, in favor of a concern known as the A. M. Gillespie Company, and against the appellant and the Astoria Overseas Corporation, one of the appellees in this case.

The judgment covered the amount of a trade acceptance drawn by the appellant upon the Astoria Overseas Corporation and by the Astoria Overseas Corporation accepted.

The Astoria Overseas Corporation by virtue of its acceptance became primarily liable for the payment of the trade acceptance.

When the judgment was entered, however, the Astoria Overseas Corporation refused to pay the amount thereof and the appellant was compelled to satisfy the judgment.

Thereafter the appellant obtained an order of the Circuit Court of the State of Oregon for Multnomah County, directing the issuance of an execution in favor of the appellant and against the Astoria Overseas Corporation, which order was based on Section 243 of Olson's Oregon Laws.

After the issuance of an execution in favor of the appellant and against the Astoria Overseas Corporation the appellant was unable to find any assets of the Astoria Overseas Corporation out of which to satisfy the judgment and instituted the present

suit asking for a decree requiring the stockholders of the Astoria Overseas Corporation to pay into court the amount of their unpaid stock subscriptions in order that such money might be applied in satisfaction of the appellant's judgment.

All of the facts above set forth were admitted by the appellees upon the trial of this case.

These admissions established the right of the appellant to maintain the present suit as a judgment creditor of the Astoria Overseas Corporation.

It was also admitted upon the trial of this case that there existed certain unpaid stock subscriptions of the Astoria Overseas Corporation aggregating \$24,692.50.

The judgment held by the appellant was for the sum of \$4206.64, plus accruing interest.

The appellees offered by way of a defense to the claim of the plaintiff the following facts:

They asserted that during the month of July, 1921, prior to the entry of the judgment in favor of the appellant, the board of directors of the Astoria Overseas Corporation assigned to the Astoria National Bank the unpaid stock subscription list of the Astoria Overseas Corporation to secure a loan of \$5000.00.

They also asserted that during the month of June, 1922, the Astoria Overseas Corporation ceased to function as a going concern, and that the board of directors of the Astoria Overseas Corporation assigned all its assets to O. B. Setters, as trustee, for

the purpose of liquidating the liabilities of the Astoria Overseas Corporation.

They also asserted that Mr. O. B. Setters, as trustee, reassigned all of such assets to the Astoria National Bank in trust for the creditors of the Astoria Overseas Corporation.

The second amended answer filed by the appellees showed, as above stated, that the unpaid stock subscriptions of the Astoria Overseas Corporation amounted to \$24,692.50.

The same answer also showed that the liabilities of the Astoria Overseas Corporation amounted to \$7414.98, plus an item of 13.56 pounds, English money, in favor of an additional concern.

These items are all set forth on page 23 of the Transcript of Record.

These same items are set forth in the testimony of Mr. O. B. Setters appearing upon pages 32 to 34, inclusive, of the Transcript of Record.

On page 34 of the Transcript of Record, Mr. Setters referred to some drafts called "Cohn Drafts," which he testified amounted to some nine thousand odd dollars, and also a claim of \$900.00 in favor of the Astoria Flour Mills.

This makes a total liability of approximately \$17,314.98.

It is a significant fact in this case that while the answer of the appellees claims that the Astoria Overseas Corporation was insolvent at the time of



making the last transfer referred to, that nevertheless the unpaid stock subscriptions exceeded the liabilities by at least \$7000.00.

Over the objection of the appellant Mr. Setters was allowed to testify as to the number of creditors of the Astoria Overseas Corporation and also allowed to state as a conclusion that the stockholders of the Astoria Overseas Corporation were practically insolvent.

No direct evidence was introduced, however, by the appellees to show that any of them were insolvent.

It is also a significant fact that at the time when the board of directors of the Astoria Overseas Corporation conveyed to Mr. Setters all of the assets of the corporation, that Mr. Setters reconveyed the same to the Astoria National Bank, which bank was already a creditor of the Astoria Overseas Corporation.

It is also a significant fact that Mr. Stone, who was president and a director of the Astoria Overseas Corporation, was also a director of the Astoria National Bank.

See pages 35 and 36, Transcript of Record.

As before stated, the appellant is a judgment creditor of the Astoria Overseas Corporation and seeks to have the unpaid stock subscriptions of said corporation applied in satisfaction of its judgment owing to the absence of other tangible assets.

This claim is admitted by the appellees but they assert that the board of directors of the Astoria Overseas Corporation transferred to the Astoria National Bank these unpaid stock subscriptions as security for a loan and also assert that they transferred to the Astoria National Bank through the medium of O. B. Setters, all the assets of the Astoria Overseas Corporation.

Upon the trial of this case the appellant contested the validity of these defenses upon the following grounds:

It first asserted that the other creditors of the Astoria Overseas Corporation were not parties to the present litigation; that no effort had been made to make them parties; and that, therefore, their claims were no defense to the present suit.

It was also asserted by the appellant that the board of directors of the Astoria Overseas Corporation had no authority to convey to the Astoria National Bank the unpaid and uncalled stock subscriptions of the Astoria Overseas Corporation because such unpaid and uncalled stock subscriptions are not an assignable asset.

The evidence showed that no call had ever been made upon these unpaid stock subscriptions and until such call is made there is nothing which the board of directors can assign.

Furthermore, the only source of power to make such calls is the board of directors and the board of

directors cannot delegate the power to make such calls.

The appellant also contended upon the trial that the board of directors of the Astoria Overseas Corporation had no authority to assign all of its assets because under the decisions of the Supreme Court of the State of Oregon the stockholders of a corporation constitute the only body authorized to make such a transfer.

This latter rule is particularly applicable in a case where the record shows that the apparent assets of a corporation exceed its liabilities, because under such circumstances, in the absence of clear proof, a corporation cannot be deemed insolvent.

The appellant also contended upon the trial that Mr. O. B. Setters as trustee of the assets of the Astoria Overseas Corporation had no authority whatsoever to reassign such assets to the Astoria National Bank.

A trustee of a corporation for the benefit of its creditors certainly cannot defeat the trust by reconveying the trust property.

Furthermore, such a trustee could not defeat the trust by conveying the trust property to a creditor.

Such a transfer would certainly carry upon its face a strong presumption of fraud.

It should be remembered in the case at bar that the appellant labored under a very severe handicap.

The testimony of Mr. Setters shows that the Astoria fire destroyed practically all the records of the Astoria Overseas Corporation prior to the trial of this case, and the appellant therefore had little or no opportunity to examine or ascertain any record facts concerning the transactions between the Astoria Overseas Corporation and the Astoria National Bank or any of the other creditors of the Astoria Overseas Corporation.

It was compelled to rely upon a very meagre cross-examination of Mr. Setters, who simply testified from memory as to the transfers in controversy.

We contend, however, that this meagre testimony when viewed in the light of the established rules of law, discloses that the transfers relied upon as a defense to the present suit were invalid transfers.

The trial court in passing upon these issues virtually admitted the correctness of the legal propositions advanced by the appellant but denied to the appellant the benefit of the rules of law referred to by holding that the stockholders themselves had validated the invalid transfers by coming into court and setting up the validity of such transfers as a defense.

The decision of the trial court is set forth on pages 26-28 inclusive, of the Transcript of Record.

The effect of this decision is as follows:

A bona fide judgment creditor comes into a court of equity and asks to have the unpaid stock sub-



scriptions of the debtor corporation applied in satisfaction of his judgment.

The stockholders of such corporation appear and admit the existence of stock subscriptions more than sufficient to satisfy the judgment.

They assert, however, that their unpaid and uncalled for stock subscriptions have already been assigned by their board of directors.

The law says that such an assignment is in the first instance invalid.

But a court of equity says to this bona fide judgment creditor: It is true that the assignment was not good in the first instance but as long as the stockholders who are liable now consent to such assignment they can defeat your claim.

In other words, the stockholders of a corporation can defeat the rights of a bona fide creditor by merely setting up and ratifying an invalid act on the part of the board of directors of their corporation.

We will contend in this brief that such a rule contravenes the well established principles of equity which preclude any individual from setting up his own wrong or the wrong of his agent as a defense to a valid claim against him.

The decision of the trial court also applies the same principle in regard to the transfer of the assets of the Astoria Overseas Corporation to Mr. O. B. Setters and the Astoria National Bank.



It appears from the record in this case, as already stated, that the unpaid stock subscriptions exceed in amount all the liabilities of the corporation.

Under such circumstances the board of directors would have no authority whatsoever to transfer all of the assets of the corporation and thereby defeat the right of a bona fide creditor.

The decision of the trial court, however, holds that the stockholders themselves appeared in this case and ratified this unlawful act and that therefore the appellant should be precluded from maintaining the present suit and obtaining the satisfaction of a judgment which it has paid for the benefit of the defendant corporation.

The decision of the trial court does not discuss at all the invalidity of the transfer from Mr. Setters as trustee to the Astoria National Bank, the creditor, and apparently approved this latter transfer because in referring to the transfer of the assets of the corporation the court used the following language:

“So likewise with the transfer of the assets of the corporation to Mr. Setter as trustee for the benefit of the creditors; that is also ratified and approved by the parties to this suit and I can conceive of no valid objection to it.”

Transcript of Record, pages 27 and 28.

The trial court also held that while the unpaid and uncalled for stock subscriptions could not be assigned by the directors, that nevertheless such

subscriptions could be assigned or their assignment consented to by the stockholders.

It may be true that the stockholders could assign an unpaid subscription which had been called for, because the call fixes and establishes the amount of the liability.

But we will contend that even the stockholders could not assign an uncalled subscription because the amount of the call could be determined only by the discretion of the board of directors.

The trial court in attempting to distinguish the rules of law advocated by the appellant entered an order directing the dismissal of this case, thereby holding that the appellant had no standing in a court of equity to obtain any portion of the unpaid stock subscriptions of the Astoria Overseas Corporation in satisfaction of a judgment which the appellant had paid for the benefit of such corporation.

We respectfully urge that the trial court was in error in so holding and as a basis for our contentions present the following specification of errors:

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### **Specification of Errors.**

#### **I.**

A judgment creditor may maintain a suit in equity against one or more of the stockholders of a corporation to have the unpaid balance due upon a stock subscription list applied in satisfaction of

his judgment, and this may be done without making other creditors parties.

*Hatch v. Dana*, 101 U. S. 205.

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## II.

Unpaid and uncalled for subscriptions cannot be sold and assigned or mortgaged by the corporation. When a call is necessary, then a corporation cannot assign the unpaid subscription.

*Thompson on Corporations*, Vol. 4, Sec. 3716;

14 *Corpus Juris*, page 638;

*Silver Hook R. R. v. Greene*, 12 R. I. 164, 165;

*Coyote Mining Co. v. Ruble*, 8 Ore. 285, 294;

*Faull v. Alaska Gold Co.*, 14 Fed. 657, 660.

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## III.

An assignment for the benefit of creditors under the Oregon statute is void because such statute is superseded by the National Bankruptcy Act.

*First National Bank v. Manassa*, 80 Ore. 53, 58;

*Pelton v. Sheridan*, 74 Ore. 176.

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## IV.

A common law assignment requires the consent of all creditors.

*Roesch v. Mumford*, 230 Fed. 56, 59.

## V.

Under the law of Oregon the stockholders of a corporation may by a vote of the majority of the stock authorize the dissolution of the corporation and the settling of its business, but such authority must come from the stockholders and this is the only source from which it can come.

*Patterson v. Portland Smelting Works*, 35 Ore. 96, 105;

*In Re Quartz Gold Mining Co.*, 157 Fed. 243 (D. C. Or.);

*Van Emon v. Veal*, 158 Fed. 1022 (C. C. A. 9th Cir.).

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## VI.

A judgment creditor has a right to remove any obstacle to satisfy his execution at law or may reach assets equitable in their nature.

*Pusey & Jones Co. v. Hanssen*, decided by the Supreme Court of the United States April 9, 1923, and reported in Volume 67 Lawyer's Edition Advance Sheets, page 479.

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## VII.

A simple contract creditor of a corporation cannot have a receiver appointed in the Federal Court sitting in equity.

*Pusey & Jones Co. v. Hanssen*, decided by the Supreme Court of the United States April

9, 1923, and reported in Volume 67 Lawyer's Edition Advance Sheets, page 479.

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### Argument.

The issues presented by this case are very simple.

As already set forth in the opening statement, this is a suit by the appellant asking a court of equity to require the stockholders of the Astoria Overseas Corporation to pay into the treasury of the court the amount of the unpaid stock subscriptions of said corporation and also asking the court to apply such moneys to the satisfaction of the judgment which the appellant holds against said corporation.

The first question presented is whether or not the appellant has a legal right to maintain this suit. This question has been set at rest by the Supreme Court of the United States in *Hatch v. Dana*, 101 U. S. 205, already cited in our specification of errors.

The case referred to was a suit instituted by a judgment creditor of a corporation seeking to have the amounts of certain unpaid stock subscriptions applied in satisfaction of his judgment.

It was contended in the case that a creditor of an insolvent corporation was not at liberty to proceed against one or more delinquent subscribers to recover the amount of his debt without an account being taken of other indebtedness and without bringing in all the stockholders.

The Supreme Court of the United States in overruling this contention affirmed a decree of the trial



court awarding to the plaintiff a judgment against the defendant stockholders for the amount of their unpaid stock subscriptions to be applied in satisfaction of the plaintiff's judgment.

In the case at bar the appellees contend that the Astoria Overseas Corporation is insolvent.

We deny this contention and assert that from the face of the record the corporation is not insolvent.

But even considering the case from the standpoint of the appellee's contention, that the corporation is insolvent, nevertheless under the rule laid down in the case of *Hatch v. Dana*, above cited, the appellant would still be entitled to the judgment prayed for in his complaint.

In the case at bar the record admits that the appellant is a bona fide judgment creditor and also admits that there are sufficient unpaid stock subscriptions to more than satisfy the appellant's judgment.

We therefore respectfully contend that under the case of *Hatch v. Dana*, 101 U. S. 205, above cited, the appellant has a right to maintain the present proceeding and is entitled to a decree as prayed for in his complaint.

The only other issue presented upon this appeal is whether or not the appellees have interposed any defense sufficient to defeat the admitted claim of the appellant and the legal right to adopt the remedy invoked in the present case.

The first defense presented is that the board of directors assigned to the Astoria National Bank the unpaid stock subscriptions of the stockholders as security for a loan of \$5,000.00.

It is admitted by the record in this case that this assignment was not authorized or directed by the stockholders of the corporation.

It is also admitted that the transfer of these unpaid and uncalled stock subscriptions was made by the board of directors of the Astoria Overseas Corporation.

We respectfully urge that neither the stockholders nor the board of directors could assign the unpaid and uncalled for stock subscriptions of the Astoria Overseas Corporation and that therefore such attempted assignment to the Astoria National Bank was void.

The rule in this particular is very accurately stated by *Thompson* in his work on Corporations in the following language:

“It has been very generally laid down by the courts of both England and this country that unpaid and uncalled subscriptions cannot be sold and assigned or mortgaged by the corporation. When a call is necessary then a corporation cannot assign the unpaid subscriptions.”

*Thompson on Corporations*, Volume 4, Sec. 3716.

The same rule is also laid down in *Corpus Juris* in the following language:

“A discretionary power vested in the directors to make calls, cannot be delegated by them unless they are authorized to do so by the charter or governing statutes.”

14 *Corpus Juris*, 638.

There is nothing in the record in the present case to show any charter authority upon which the board of directors of the Astoria Overseas Corporation acted.

We have also examined the statutes of Oregon and fail to find any statute of the State of Oregon authorizing such action.

The same rule was also announced by Cook in his work on Corporations in the following language:

“The unpaid and uncalled for subscriptions for stock cannot be mortgaged or sold by the corporation. If the transfer by the directors were allowed, the consequence would be that the discretion which they are bound to exercise would be wholly defeated and put an end to. The power of making calls being a discretionary one, cannot be transferred to other parties. The transfer is void.”

*Cook on Corporations*, Vol. 1, Sec. 111.

In *Fletcher's Cyclopedia, Corporations*, Vol. 2, page 1552, the rule is stated as follows:

“By the weight of authority, in the absence of charter or statutory authority a corporation cannot pledge, mortgage or assign unpaid subscriptions when a call is necessary and has not been made, so as to entitle the pledgee, mortgagee or assignee to collect the same, for in such a case *the making of the call is dis-*

*cretionary with the directors or stockholders, and they cannot delegate the exercise of such discretion to another, unless expressly authorized to do so.”* (Citing both American and English cases.)

The same rule was also recognized by the Supreme Court of Rhode Island and in its decision the court used the following language giving the reason for the ruling.

“The reason for the rule is based upon the well known rule of agency, sustained by the uniform current of authority, that the power conferred upon another to do an act which requires the exercise of judgment and discretion cannot be redelegated. The power conferred on the directors to make calls is of such a nature and cannot be redelegated by them.”

*Silver Hook R. R. v. Greene*, 12 R. I. 164, 165.

The record in the case at bar fails to disclose that any call was made upon the unpaid stock subscriptions of the Astoria Overseas Corporation at the time of the assignment to the Astoria National Bank.

The same record also affirmatively shows that no call has been made upon such subscriptions.

This appears from the testimony of Mr. Setters on page 32 of the Transcript of Record, wherein he states as follows:

“That this litigation and other litigation came up and no effort has been made to make any collections on the stock subscriptions until the final result of the present suit.”



We therefore respectfully urge that the alleged assignment of the unpaid stock subscriptions of the Astoria Overseas Corporation to the Astoria National Bank was as a proposition of law invalid and therefore cannot constitute a defense to the present suit.

The trial court held, however, that when the stockholders of the corporation appeared in this suit and alleged as a defense that such assignment of the unpaid stock subscriptions had been made, they thereby ratified the assignment and converted an invalid act into a valid act.

The fallacy of this decision is established by its mere statement.

This announcement overlooks the rule that not even the stockholders themselves could assign the unpaid stock subscriptions until a call had been made upon such subscriptions.

Until such call has been made no liability is established upon the part of the stockholder (in the absence of an express contract to the contrary) and there is no obligation in being, which is susceptible of assignment.

If the stockholders themselves could not in the first instance have made the assignment without having first made a call, then can it be logically contended that they can accomplish by ratification or by indirection that which they cannot accomplish directly.



Ratification implies that there is some act which can be ratified.

The stockholders of the Astoria Overseas Corporation could not ratify an absolutely void act of the board of directors.

Much less could they ratify an act which they themselves could not have done.

The most that the stockholders could do would be to adopt the action of the board of directors.

Such adoption, however, would date from the time of their appearance in the present case and this was long subsequent to the procurement of the judgment by the appellant.

Neither the stockholders nor the Astoria National Bank could convert the original void act into a valid act and have it relate back to the date of the act for the purpose of defeating the rights of the appellant, which is an innocent judgment creditor.

The directors could not assign the uncalled stock subscriptions.

The stockholders could not assign the uncalled stock subscriptions.

Therefore, there was nothing which the stockholders could adopt to the detriment of the appellant.

The most that could be claimed for such adoption by the appearance in this case would be that the stockholders themselves would be estopped as against

a subsequent creditor from setting up the void act of the board of directors as a defense.

Furthermore, to permit such a defense, in any event, should be contrary to the conscience of a court of equity.

The appellant in this case drew a sight draft upon the Astoria Overseas Corporation.

The Astoria Overseas Corporation accepted such draft.

By this act it made itself primarily liable for the payment of the obligation.

It refused to pay the obligation.

An action was then instituted against the corporation and a judgment obtained against the corporation as acceptor and against the appellant as drawer.

The drawer was then compelled to pay the judgment which had been obtained.

After it had paid the judgment it then called upon the Astoria Overseas Corporation for reimbursement.

Not a single stockholder of the corporation came forward and offered to contribute a penny to reimburse the appellant for the payment of this judgment.

Not a single effort was made by the Astoria Overseas Corporation or its stockholders to satisfy this judgment.

Mr. Stone, who is the president and director of the Astoria Overseas Corporation, and who was likewise a director of the Astoria National Bank, did not do a single thing to aid in the satisfaction of the judgment which the appellant had paid.

The appellant was then compelled to come into a court of equity and ask the aid of such court to obtain funds from the stockholders of the Astoria Overseas Corporation out of which to satisfy the judgment which it had paid.

Then at the eleventh hour, these very same stockholders come into court and assert that they should not be compelled to contribute anything toward this judgment because their agent, the board of directors of the Astoria Overseas Corporation, had already assigned some \$24,000 worth of unpaid stock subscriptions to the Astoria National Bank to secure a loan for \$5000.00, at a time when the Astoria Overseas Corporation had no existing liabilities.

This latter fact appears from the following statement of Mr. O. B. Setters on page 31 of the Transcript of Record:

“That in July, 1921, it became necessary for the company to borrow \$5000. That the company at that time had no other liabilities and its assets were the unpaid subscriptions of the stockholders of the corporation.”

In other words, the stockholders of this corporation come into a court of equity and say to the appellant: It is true that you have paid a judg-

ment which the Astoria Overseas Corporation was primarily obligated to satisfy; it is true that you are a bona fide judgment creditor; it is true that there are some \$24,000 worth of unpaid stock subscriptions of the Astoria Overseas Corporation; it is true that at the time when the Astoria Overseas Corporation had no other liabilities our board of directors, without making any call upon our stock subscriptions, assigned to the Astoria National Bank our \$24,000 worth of subscriptions as security for a loan of \$5,000; it is likewise true that after our board of directors made this assignment to the Astoria National Bank, they again assigned the same thing in the month of June, 1922, to Mr. O. B. Setters as trustee (see page 22, Transcript of Record); it is also true that Mr. Setters took those very same assets and reassigned them to the Astoria National Bank, the very concern to which the first assignment had been made; nevertheless, we say to you that you cannot compel us to contribute anything to the satisfaction of the judgment which you have paid because we now voluntarily affirm and ratify the invalid acts of our board of directors.

Should a court of equity give countenance to such a practice?

If the first assignment to the Astoria National Bank was a valid assignment, why was it necessary to make a second assignment?

If the first assignment to the Astoria National Bank was a valid assignment, how could the board



of directors of the Astoria Overseas Corporation then assign the same identical assets to a trustee for the benefit of creditors?

If the first assignment was a valid assignment, why should the Astoria National Bank want a trustee for the creditors of the corporation to reassign to it, in violation of his trust, the very thing which had been assigned to such bank in the first instance?

The second amended answer of the appellees states that the assets of the Astoria Overseas Corporation were reassigned by Mr. Setters to the Astoria National Bank, to be held in trust for the creditors of the Astoria Overseas Corporation.

See Paragraph 4, page 22, Transcript of Record.

How could the Astoria National Bank hold as trustee for the benefit of the creditors of the Astoria Overseas Corporation the very assets which it claimed to have received by a proper assignment as security for an advance which had been made?

When these questions are carefully considered and this entire record is examined, it seems to us that there exists a strong attempt on the part of the appellees in this case to manipulate in such a manner as to defeat the rights of a bona fide judgment creditor.

They say, first, that the only assets of the Astoria Overseas Corporation at the time of the assignment to the Astoria National Bank were the unpaid stock subscriptions of the corporation.



See page 31, Transcript of Record.

They say that at the time of the assignment to Mr. Setters as trustee and the reassignment to the Astoria National Bank that the only assets of the Astoria Overseas Corporation were the unpaid stock subscriptions.

See page 32, Transcript of Record.

In other words, they say you cannot compel us to pay in this case because we have given all of our assets to the Astoria National Bank as security for a loan.

They say in the second place that you cannot compel us to contribute anything in the present proceeding because we have assigned all of those assets to the same Astoria National Bank for the benefit of all our creditors.

They assert, in other words, that if we cannot defeat your claim by one defense, we will defeat it by another.

The trial court then says that even though the assignments might not have been valid in the first instance, nevertheless they were ratified by the appearance of the stockholders in this case.

Which assignment was ratified?

Was it the first assignment as security for the loan of \$5,000 or was it the second assignment to the trustee for the benefit of creditors?

The decision of the trial court does not distinguish in this particular.

We have laid considerable stress upon the equities of the situation because it seems to us that the record in this case discloses a deliberate attempt to evade the obligation owing to the appellant.

In the first place we assert as a legal proposition that the assignment of the unpaid stock subscriptions by the board of directors of the Astoria Overseas Corporation was a void assignment because no call had been made upon such subscriptions.

We assert, in the second place, that the stockholders of a corporation cannot come into a court of equity and indirectly establish by ratification an act which they could not legally perform in the first instance.

We assert, in the third place, that the stockholders of a corporation should not be allowed to come into a court of equity and set up inconsistent positions for the purpose of defeating a bona fide judgment creditor.

We also assert that such stockholders should not be allowed to come into a court of equity and set up their own omissions, transgressions and the invalid acts of their own directors as a basis for defeating an honest claim.

He who comes into equity should come with clean hands and he certainly should not be permitted to attempt to wash his hands and present the unclean water as a defense.

The trial court apparently fell into error by failing to recognize in this case the distinction be-

tween stockholders, as individuals or as a body, and the corporation as entirely separate and distinct entities. It admits:

“That the unpaid and uncalled-for subscriptions to the capital stock of a corporation cannot be sold or pledged by the corporation” (Transcript, page 27),

but claims that in the present case the mortgage transfer was ratified and approved by the stockholders appearing in court and insisting upon the validity of the transfer.

But if the corporation had no right to make the transfer, it cannot be held that the corporation would have the right, provided that it was done by the corporation through certain representatives. If the Astoria Overseas Corporation would not have the power to execute an assignment in its own name by the president, secretary or board of directors, how can it be held that the corporate powers are increased by merely executing the assignment in the name of the Astoria Overseas Corporation by the stockholders? In other words, if John Doe has not a lawful right to do a certain act himself, how can it reasonably be held that that act done by John Doe himself or by Richard Roe, his agent, is unlawful, but that the same act would be perfectly proper and lawful if done by John Doe through his agent Henry Smith?

Moreover, there was no action taken by the stockholders even purporting to act for the corporation in ratifying the mortgage transfer by the directors.

It certainly was not done at a stockholders' meeting, and the mere assent of the stockholders taken separately, and not at a stockholders' meeting, is not the will of the corporation, because the stockholders cannot separately and individually give their consent so as to bind the corporation. If an assent to certain acts affecting the corporation is obtained from the stockholders outside of a stockholders' meeting, or if an attempt is made to have the stockholders ratify any action of the board of directors by obtaining the ratification separately from each individual stockholder, written or otherwise, outside of a stockholders' meeting, the stockholders are deemed to be acting for themselves individually, and not as acting in any way for the corporation.

*Pierce v. N. O. Building Co.* (La.) 29 Amer. Dec. 448;

*Clark v. Omaha Co.*, 5 Nebr. 314;

*Duke v. Markham* (S. C.) 10 S. E. 1017;

*Langolf v. Seiberlich* (Pa.) 2 Pars. Eq. Cas. 64;

*Findley Leather Co. v. Kurtz*, 34 Mich. 89 (Opinion by Chief Justice Cooley);

*Hill v. Atlantic Company* (S. C.) 55 S. E. 854;

*Lawrence v. Montgomery Gas Co.* (W. Va.) 106 S. E. 890.

In *Duke v. Markham* (supra), followed in *Hill v. Atlantic Company* (supra) the court quotes with approval from the case of *Liggett v. Banking Com-*



pany, 1 N. J. Eq., page 541, as follows (10 S. E. 1017 on page 1018):

“The members of a corporation aggregate cannot separately and individually give their consent in such a manner as to oblige themselves as a collective body, for in such case it is not the body that acts; and this is no less the doctrine of the common, than of the Roman civil, law. ‘Being lawfully assembled’ says Ayliff, ‘they represent but one person, and may consequently make contracts, and, by their collective assent, oblige themselves thereunto.’ And, though all the members of a corporation covenanted on behalf of it under their private seals,” this it was held, would only bind them personally, and not the corporation. Ang. & A. Corp. 232, which is supported by the numerous cases there cited. Again, in the same work, (Section 504:) “the separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers.” Indeed, the authorities on this subject are numerous, uncontradicted, and supported by reason.”

The most recent case on the point (May, 1921) is that of *Lawrence v. Montgomery Gas Co.* (supra). The following quotation is from the opinion of the court:

“The law is well settled in this state as well as elsewhere that corporate action cannot be lawfully expressed or made binding by less than a quorum of the directors or stockholders acting jointly in a meeting thereof, regularly called after due notice as provided by law or By-law.”

The court then quotes *Thompson on Corporations*, paragraph 3906, to the point that when they are not



consulting together as a board they are regarded as acting privately and unofficially.

In the present case there was not even an agreement between the stockholders to ratify the action of the directors, but there is merely the implied assent of those stockholders whose subscriptions were not fully paid up and named as defendants in this action. It does not even appear that such stockholders constitute a majority of the stockholders in the corporation. Such a ratification by the stockholders would, at the very most, indicate, only that the stockholders adopted as their own the action of the directors, who did not even pretend to be acting for the stockholders individually, and which would transfer to the bank merely their rights in their contract subscriptions with the corporation.

If a man enters into a contract with a corporation to buy a certain number of its shares of stock, and pays a part of the contract price, no doubt he has a right to assign to another his interests in the contract, that is, the right to pay the balance and receive the stock. But by no manner of means can that act be considered the act of the corporation, whether such an assignment is made by one stockholder or by all of the stockholders.

If, therefore, it can reasonably be held that one may ratify the act of another who did not act as the agent of the former, then the only interest which the bank acquired by the supposed ratification was the right to pay the balance due and re-

ceive from the corporation the certificates of stock as provided in the subscription contracts.

We respectfully urge that on this branch of the case the trial court was in error and that the decree should be reversed and a decree entered in favor of the appellant.

The second defense presented in this case is that all of the assets of the Astoria Overseas Corporation were transferred by the board of directors of the corporation to O. B. Setters, as trustee and by him reassigned to the Astoria National Bank.

It is asserted by way of conclusion in the answer of the appellees that in the latter part of May or the first of June, 1922, the corporation stopped functioning and that the board of directors conveyed all its assets, to wit, its unpaid stock subscriptions, for the benefit of its creditors.

There is no evidence in the case absolutely establishing that the corporation was insolvent.

On the contrary, the list of unpaid stock subscriptions and the list of liabilities introduced at the trial showed, as already pointed out, that the stock subscriptions exceeded the liabilities by approximately \$7000.00.

The appellant objected to the introduction of this list of liabilities upon the ground that the other creditors were not parties to this suit, but this objection was overruled and Mr. Setters was allowed to testify that most of the stockholders were insolvent.

Not a single effort was made by any of the stockholders to show their insolvency and we contend that from the face of the record the insolvency of the Astoria Overseas Corporation is negatived by its own statement of assets and liabilities.

Under such circumstances the board of directors certainly had no authority to convey all of these assets to Mr. Setters as trustee.

The rule of law applicable in this particular was announced by the Supreme Court of Oregon in the following language:

“A private corporation, organized under the law of this state, may, at any meeting of the stockholders called for that purpose, by a vote of a majority of the stock, authorize the dissolution of such corporation, the settling of its business, and the disposing of its property; Hill’s Annotated Laws, Section 3235. The statute having prescribed the source from which emanates the authority for winding up the affairs of the corporation and liquidating its debts, the origin thus provided is exclusive.”

*Patterson v. Portland Smelting Works*, 35 Ore. 96, 105.

The rule last referred to was cited with approval by the District Court for the District of Oregon, in the case of *Quartz Gold Mining Co.*, 157 Fed. 243, which case was affirmed by the Circuit Court of Appeals of the Ninth Circuit, 158 Fed. 1022.

In the case last cited an insolvent corporation endeavored through its board of directors to commit an act of bankruptcy.

Judge Wolverton held that under the Oregon statute the board of directors of even an insolvent corporation could not commit an act of bankruptcy.

In passing upon the question the court used the following significant language:

“Under the Oregon statute, at the first meeting of the stockholders and the election of directors, the powers vested in the corporation are to be exercised by such directors. \* \* \* The powers thus accorded must be to conduct and carry out the business designated and specified in the articles of incorporation. The directors could have none other, unless specifically conferred. It is not an ordinary power pertaining to the board to dissolve the corporation, or to wind out its business; and the Legislature of the state has declared that the stockholders may do these acts. So that, under the statute, the directors are without any power whatsoever in the premises. If they cannot authorize dissolution and a winding out of the business of the corporation, it would seem to logically follow that they could not, in behalf of and as the act of the corporation, commit an act of bankruptcy which entails an entire disposition of the assets of the concern and a full settlement of all its past business transactions, unless by some authority of the stockholders, through appropriate by-laws or specific resolutions empowering them to so act.”

*In re Quartz Gold Mining Co.*, 157 Fed. 243, 246.



The decision last cited was adopted as the decision of the Circuit Court of Appeals for the Ninth Circuit, 158 Fed. 1022.

Under the decision of Judge Wolverton last cited, it was virtually held that not even the directors of an insolvent corporation could convey all of its assets without the authority of its stockholders. And what has been said heretofore in reference to the supposed ratification by the stockholders of the mortgage transfer to the bank applies equally as well to the supposed ratification by them of the assignment to Setters.

In the case at bar, therefore it is immaterial for the purpose of this discussion whether the Astoria Overseas Corporation was solvent or insolvent.

We therefore respectfully urge that the alleged assignment by the directors of the Astoria Overseas Corporation to O. B. Setters as trustee of all the assets of said corporation was an invalid assignment because not authorized by a majority of the stockholders of the corporation, nor at a stockholders' meeting.

It should be remembered, also, in this connection that the thing which was assigned to Mr. O. B. Setters was the subscription list of uncalled stock subscriptions and the authorities which we have already cited hold that not even the stockholders can assign an uncalled stock subscription list.



We also assert that if the stockholders could not in the first instance have assigned an uncalled stock subscription list then certainly they could not cure by ratification the thing which they could not do in the first instance, because until the call was made there was nothing to assign.

The same observations regarding the equities of the case which are applicable to the first assignment, likewise apply to the second assignment.

Should the stockholders of the Astoria Overseas Corporation be permitted to come into a court of equity and defeat the rights of an innocent bona fide judgment creditor by setting up and attempting to ratify an invalid act.

The doctrine of ratification might apply as against the stockholders themselves but certainly should not apply as against an innocent judgment creditor.

Furthermore, we have the same incongruity, already pointed out, in connection with the first assignment.

At the time of the first assignment the only assets of the corporation were the uncalled for stock subscriptions.

These were attempted to be assigned to the Astoria National Bank.

At the time of the second assignment the only assets of the corporation were the uncalled for

stock subscriptions and an attempt was made to assign these to Mr. Setters for the benefit of the creditors and Mr. Setters in direct violation of his trust attempted to assign those very uncalled for stock subscriptions to the Astoria National Bank for the benefit of all the creditors.

This second contention on the part of the appellees again emphasizes the absolute incongruity of the defense.

If as the trial court held, the stockholders had ratified both of these assignments, and have thereby injected life into them, then where are the unpaid stock subscriptions at the present time?

Are they in the hands of the Astoria National Bank by virtue of the first assignment or are they in the hands of the Astoria National Bank by virtue of the second assignment?

In the first instance it is claimed that the bank holds them as security for a loan.

In the second instance it is contended that the bank holds them as assets for the benefit of the creditors of the Astoria Overseas Corporation.

How can the Astoria National Bank occupy two such incongruous positions, and yet the decision of the trial court specifically and separately validates both of these assignments. We again revert to the inconsistency in this particular in order to emphasize the inequitable position asserted by the stockholders and appellees in this case and to show how

the said stockholders are attempting by every hook and crook to evade the legitimate claim asserted by the appellant in this case.

In addition to all of the above we contend that the assignment to Mr. Setters as trustee was invalid because there is no evidence showing that the consent of all the creditors was obtained.

It has been held by the Supreme Court of the State of Oregon that the statutory provisions of the State of Oregon governing assignments for the benefit of creditors have been suspended by the National Bankruptcy Act and are therefore void.

This rule was laid down in the case of *First National Bank of Manassa*, 80 Or. 57.

It must therefore follow that the assignment alleged in the answer of the Astoria Overseas Corporation was a common law assignment.

Such a common law assignment would necessitate the consent of all creditors.

This rule was laid down by the Circuit Court of Appeals for the Third Circuit in the following language:

“This conveyance grew out of Shinn’s insolvency and was suggested by his anxiety to conserve his property for the benefit of all his creditors. For some reason he did not choose to pursue the course provided by the Federal Bankruptcy Act or the one open to him under the general Assignment Act of the State of New Jersey. \* \* \* If he had adopted either of these courses the rights of all creditors would

have been fixed by law. As he pursued neither this acceptance by his creditors for the remittance they already had, of course, had to be obtained.”

*Roesch v. Mumford*, 237 Fed. 56, 59.

The next contention urged by the answer of the appellees is that they as stockholders are entitled to have a receiver appointed for the benefit of all the creditors of the Astoria Overseas Corporation.

The trial court did not pass upon this question because by the dismissal of the case such question was eliminated.

This question, however, has been set at rest by the Supreme Court of the United States in the recent case of *Pusy & Jones v. Hanssen*, decided April 9, 1923, Volume 67, Lawyer's Edition Advance Sheets, page 479.

In the case last cited the Supreme Court held that a simple contract creditor could not have a receiver appointed in a federal court sitting in equity.

Certainly a stockholder could have no greater rights in such particular than a creditor.

The same case further held that state statutes governing the appointment of receivers had no effect in a federal court of equity.

Therefore, the claim of the appellees for the appointment of a receiver should be denied.

While the appellant's case is based upon the foregoing rules, we think it not improper to call



the court's attention to the further point that the trial court inadvertently placed the appellant in a situation whereby it is likely, in the future, to be cut off from certain benefits given to it under the rules in equity, and at the same time will give the appellees a most unconscionable advantage. If the decision of the trial court is allowed to stand it will deny forever all hope of reimbursement for funds expended by appellant in behalf of appellees and in payment of a debt for which the appellees were liable.

The trial court held that, as the stockholders had, by their defense to the action, consented to the mortgage transfer of the unpaid stock subscriptions to the bank, the appellant had no claim whatever against the fund for unpaid stock subscriptions. This necessarily follows from the fact that the whole purpose of the appellant's action and the prayer of its complaint was to subject those unpaid stock subscriptions to the appellant's claim, and after a hearing in full, the complaint was dismissed and a decree ordered in favor of the appellees.

No doubt it was the right of the appellees to assume the risk of an adverse decision if they chose, in not making the bank a party to the action. In such a case they might subsequently have to defend a suit brought against them by the bank, and be compelled to litigate the same issue, that is the validity of the mortgage transfer of the unpaid stock subscriptions to the bank. But that was the



appellees' option, and the exercise of it can in no way affect the appellant's rights. The issue in this case is whether, as between appellant and appellees, the former is entitled to the unpaid subscriptions or any part thereof. If the mortgage transfer to the bank was invalid, then the appellant is entitled to all of the unpaid subscriptions. If it was valid, as the lower court held, then the indebtedness by appellees to appellant being admitted, the latter is entitled to whatever interests the appellees had in that fund; namely, the total unpaid subscriptions, subject to whatever interests the bank may have in that fund.

If we assume, for the purpose of argument only, that the mortgage transfer of the unpaid stock subscriptions to the bank was valid, that would place the parties in this situation: the common debtors are the appellees; one creditor, the bank, has two sources of liabilities from which its claim might be paid; first, the personal liability of the directors who signed the note to the bank jointly with the Astoria Overseas Corporation, as makers (Transcript, page 31), and second, the personal liability of the stockholders on the unpaid subscriptions. The appellant, however, can be paid only from one source of liability, that is, the unpaid stock subscriptions. Such a case clearly calls for the application of that general principle of equity that if one party has a right to be paid from two funds for a debt, and another party has a right to be paid from one only of the funds for another debt, the latter has a right in equity to compel the former to

resort to the other fund in the first instance for satisfaction, if that course is necessary for satisfaction of the claims of both parties.

*Russel v. Howard*, Fed. Cas. No. 12,156;

*Merchants National Bank v. McLaughlin*, 2 Fed. 128;

*Covington National Bank v. Commercial Bank*, 65 Fed. 547;

*Matthews v. Memphis Railroad Company*, 108 U. S. 368, 27 L. Ed. 7567.

In the United States Supreme Court case last above cited the facts were that one John Scruggs entered into a contract with the railroad company by which he agreed to erect on the railroad company's land a railroad hotel and to pay the railroad company an annual rent of \$250. The railroad company reserved the right under the contract to take possession of the hotel and pay Scruggs its value. Scruggs also reserved the right to surrender the hotel to the railroad company, and require the company to pay him its value. Thereafter Scruggs erected the hotel, and conveyed it to his wife, together with his leasehold interest in the railroad company's land. On the same day Mrs. Scruggs agreed with the railroad company that the lease of the land and the property thereon should be surrendered to the railroad company. The amount to be paid to Mrs. Scruggs by the railroad company was submitted to arbitration, and an award was given to Mrs. Scruggs. The railroad company re-

fused to pay the award, or take possession of the property, during which time Mrs. Scruggs received the income from the property. It further appeared that Mrs. Scruggs had, during the life of the leasehold interest, executed to one Viser a mortgage upon the leasehold and improvements thereon. It was held that this mortgage gave Viser a lien on the income of the property covered thereby. Thus it appeared that the railroad company could satisfy its claim against Mrs. Scruggs out of either of two funds, that is, the amount due to Mrs. Scruggs by the railroad company, or the income received by Mrs. Scruggs, who was insolvent, from the property. Viser, on the other hand, had a lien against only one fund, that is, the income from the property. The court applied the above equitable doctrine, and held that Viser's claim should be satisfied out of the income of the property which was represented by a fund deposited in court. The court said:

“There were then two funds, the principal and the interest of the decree (note: in favor of Mrs. Scruggs against the railroad company for the value of the improvements). Viser had a lien on the interest, and the demand of the railroad company was payable out of their principal or interest. Following, therefore, the practice of Courts of Equity in marshaling securities, *Aldrich v. Cooper*. 8 Ves. 382, the court directed the payment of Viser's lien out of the interest.”

Of course, no such order could be made in the present case, because the bank is not a party to this action. But supposing the decision of the lower

court is allowed to stand, and the appellant brings another action against the appellees and makes the bank a party respondent also, in order to marshal the debtor's assets, providing, of course, it established the right to them. Exactly the same issue would be involved in such a case as was litigated in the present action; namely, the appellant's right to have applied to its debt the unpaid stock subscriptions. The issue in reference to the right to marshal the assets of the debtor would be only incidentally involved, in that it is merely a means to apply the unpaid subscriptions to the appellant's debt, in the event that appellant could show that it was entitled to them. In fact, the complaint in such a subsequent action would be exactly like the complaint filed in the present action, with the additional allegations affecting only the additional respondent, the bank.

The parties would be the same, the addition of another party respondent would in no way affect the case between appellant and appellees. In short, there would not be one single bar to the plea of *res judicata* by appellees in a subsequent action brought by appellant, and, as it has been already adjudged that the appellant has no cause of action against the debtors, the appellees, for the unpaid subscriptions, there could not, of course, be any relief against the bank in marshaling the assets of the debtors.

Again, supposing the bank collects the full amount due on the unpaid stock subscriptions, de-



ducts the amount of its loan, and has a balance left of approximately \$19,000 which it holds for the benefit of the appellees. Under the decision of the trial court, that appellant is not entitled to have the unpaid stock subscriptions applied on appellees' indebtedness to it; the creditor, the appellant, is placed in a most exasperating position, and a great injustice is done. Here are the debtors, admitting the debt, and with funds about to be turned over to them as their own. Yet the court would be bound to confess its helplessness to order that the balance of the fund be paid over to the creditor, or to assist the creditor in any way, solely because of the existing decision that the appellant is not entitled to the unpaid stock subscriptions or any part thereof.

If the trial court believed that the mortgage transfer to the bank was valid, it should have held that the appellant was at least entitled to the appellees' equity in the unpaid stock subscriptions, that is, the total amount of such unpaid subscriptions subject to the claims of the bank. The bank could then have been brought in by supplemental proceedings and the priorities to the fund determined as between the appellant and the bank.

Our position here, however, is that the mortgage transfer of the unpaid stock subscriptions to the bank is invalid, and if the court agrees with us upon that point it will be unnecessary to consider this phase of the case.



In conclusion, we assert the following propositions:

I.

The appellant as a judgment creditor is entitled to maintain the present suit and have the unpaid stock subscriptions of the Astoria Overseas Corporation applied in satisfaction of its judgment.

II.

The assignment of the uncalled stock subscription list to the Astoria National Bank by the board of directors of the Astoria Overseas Corporation was in contemplation of law an invalid assignment because an uncalled subscription cannot be assigned.

III.

The assignment of all the assets of the Astoria Overseas Corporation by the board of directors of the Astoria Overseas Corporation was an invalid assignment because made without the consent or authority of the stockholders.

IV.

The stockholders of the Astoria Overseas Corporation could not by appearance in the present case ratify the assignment of the uncalled stock subscriptions to the Astoria National Bank because such uncalled subscriptions are not an assignable asset.

V.

The act of the board of directors in assigning all the assets of the Astoria Overseas Corporation to

O. B. Setters as trustee could not be ratified by the stockholders of the corporation because the corporation was not in an insolvent condition and because the consent of all the creditors to such an assignment was necessary.

## VI.

The stockholders of the Astoria Overseas Corporation should be in equity estopped from attempting to defeat the claim of the appellant by asserting in one breath that they ratified the action of their board of directors in assigning their uncalled subscriptions to the Astoria National Bank, and then asserting in the next breath that they ratified the assignment of their uncalled stock subscriptions to O. B. Setters as trustee for the benefit of creditors, and in turn ratified the breach of trust by Mr. Setters in conveying such assets to the Astoria National Bank, which bank claims to have already held those very assets as security for a loan.

The defenses interposed by the appellees in this case violate well established principles of law; contravene the soundest principles of morals and equity; bear strongly the impress of evasion and fraud; and attempt to defeat by evasion, rather than to openly defend, the legitimate claim of a judgment creditor which has paid out a large sum of money on an obligation for which the Astoria Overseas Corporation and its assets are primarily liable.

For the reasons presented we respectfully urge that the decree of the trial court should be reversed

and a decree entered in favor of the appellant in this case.

Respectfully submitted,

IRA S. LILLYCK,

PLATT & PLATT,

MONTGOMERY & FALES,

*Solicitors for Appellant.*



No. 4068.

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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General Steamship Corporation,  
(a corporation),

Appellant.

vs.

Astoria Overseas Corporation, (a corporation), Olof Anderson, O. E. Anderson, O. B. Setters, T. L. Gaul, H. Vance, Lee Drake, R. R. Bartlett and C. A. Nyquist.

Appellees.

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## BRIEF FOR APPELLEES.

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O. B. SETTERS,

Solicitor for Appellees.

Astoria, Oregon.





No. 4068.

IN THE

# United States Circuit Court of Appeals

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General Steamship Corporation,  
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**Appellees.**

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## BRIEF FOR APPELLEES.

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### ARGUMENT.

In reply to the argument presented in the Brief for Appellant it will not be necessary to present to this Court an extended argument as there are but few questions to be considered by this Court. The Appellees have not disputed the claim of the Appellant and as was decided by the Hon. Judge Bean there are but two questions at issue.

**First**, was the assignment or mortgage given the Astoria National Bank which was necessary for the loan of Five Thousand Dollars (\$5000.00) a valid assignment and mortgage so as to give the Astoria National Bank a first lien on the unpaid subscriptions to the stock?

**Second**, was the assignment made to O. B. Setters of the assets of the corporation for the benefit of the creditors a valid assignment?

Calling the Court's attention to the evidence of O. B. Setters on Page 31 of the Transcript of Record, the Court will note that in July 1921 it was necessary to secure a loan of \$5000.00 to liquidate the then liabilities of the corporation. Quoting the witness O. B. Setters:—

“That the defendant corporation was organized in the fall of 1920 and functioned until June 1st, 1922. That the stockholders subscribed for the bigger portion of the stock and paid a portion of the subscription at the time. That in July 1921, it became necessary for the company to borrow \$5000.00. That the company at that time had no other liabilities, and its assets were the unpaid subscriptions of the stockholders of the corporation. That arrangements were made with the Astoria National Bank to borrow \$5000.00 on condition that the Board of Directors endorsed the note for \$5000.00, which they did, and on the further condition that the unpaid stock subscriptions of the stockholders be assigned to the Astoria

National Bank for the purpose of additional security, and by Resolution of the corporation made by the Board of Directors at the time the loan was made, the unpaid stock subscriptions of the corporation were assigned to the Astoria National Bank."

This evidence was not denied. Calling the Court's attention to Section 6880 of Olson's Oregon Laws, which Section reads as follows:—

**"TRANSFER OF BUSINESS AS A WHOLE HOW MADE.** A sale, lease, assignment, transfer or conveyance of the business, franchise and property **as a whole**, of any corporation now existing or hereafter formed in this State, may be made with the consent of the stockholders thereof holding of record as much as two-thirds of the issued capital stock of such corporation, provided such consent be expressed at a regular or special meeting of the stockholders of such corporation called for that purpose, and provided that such sale, lease, assignment transfer or conveyance be in consideration of lawful money of the United States; and provided further that nothing herein contained **SHALL BE CONSTRUED TO LIMIT THE EXISTING POWER OF THE STOCKHOLDERS OR DIRECTORS OF SUCH CORPORATION TO MAKE SALES, LEASES, ASSIGNMENTS OR CONVEYANCES OF CORPORATE PROPERTY OTHER THAN AS HEREIN SET FORTH.**"

The Court will note from the foregoing Section that a lease, assignment, transfer or conveyance of the business, franchise and property as a whole of

any corporation, now existing or hereafter formed in this State may be made with the consent of the stockholders thereof holding of record as much as two-thirds of the issued capital stock of such corporation. This Section refers as I take it to the sale of all property of the corporation. The case at Bar shows that only the unpaid subscriptions of the stockholders were assigned as collateral for the loan of money and no attempt was made by the Board of Directors and the stockholders to dispose of all of the property of the corporation at the time that the loan was made with the bank in July 1921.

Again calling the Court's attention to the testimony of O. B. Setters on Page 34 of the Abstract of Record:—

“That the assignment of the corporation, which was made at a time when there were no liabilities save and except this \$5000.00 of the bank, was made in good faith by the Board of Directors to the Astoria National Bank for the purpose of securing said liability, and the liabilities which are enumerated in the defendant's answer as..... listed by O. B. Setters were all contracted months after this assignment was made to the bank and became a liability against the company the latter part of the year 1921 and up to the 1st, of June 1922.

The Court will note that from the above testimony that at the time of the placing of this security as collateral the corporation was not insolvent and that



it was free from all liabilities save and except the obligation it then incurred in making the loan of \$5000.00 from the Astoria National Bank.

We contend that the corporation had a just and legal right to mortgage and assign the unpaid subscriptions of stock to the Astoria National Bank, and that this contention is clearly borne out in the decision rendered in the following case.

SABIN vs. COLUMBIA RIVER LUMBER & FUEL CO., et al, found in (25th Ore. 34 Pac. Page 693, quoting from subdivision "2" of Decree on Page 696:—

"It is urged that at the time the mortgages were given the corporation was insolvent and that the bank knew or suspected that it had not sufficient means to pay all its creditors in full, and demanded security for its debts and thereby obtained an undue advantage over other creditors. If these conditions actually existed, the validity of the security so taken might well be questioned; but we do not think that there was such a condition in the financial affairs of this company as would justify the conclusion that a state of insolvency existed which would preclude a bank from demanding and receiving the security which was given for its debt. It is true that at this time the company was largely in debt, and may perhaps have been insolvent within the meaning of that term as used in bankrupt or insolvent laws. It was, however, a "going concern" engaged in the conduct of the business for which it was incorporated

and not known or believed to be insolvent by its officers or agents, and with assets exceeding its liabilities by at least \$20,000.00 according to the least value placed thereon as appears from the testimony. Such a corporation can hardly be said to be insolvent, within the rule sought to be invoked in this case. It is difficult if not impossible to lay down a definition of insolvency applicable to all cases. It must necessarily be construed with reference to the facts of each particular case. In its general and popular meaning it is used to denote the insufficiency of the entire property of an individual to pay his debts, but under the bankrupt and insolvency proceedings, which were designed for the benefit of the debtor, it is used in a more restricted sense, and denotes the inability of a party to pay his debts as they become due in the ordinary course of business.

**TOOF vs. MARTIN** 13 Wall -40 **WEBB vs. SACHS** 4 Sawy. 158.

And to this effect are the authorities cited by plaintiff. We are however not disposed to apply the rigor of the rule that obtains in bankrupt proceedings to a case of this character. It often happens that corporations with assets more than sufficient than to pay all their debts, are unable to meet an outstanding obligation as it matures, and without undertaking to lay down any definite rule by which the question of the solvency or insolvency of a corporation may be determined, it is sufficient for the purpose of this case to say that so long as the corporation is a "going concern" engaged in the conduct of the business for which it was organized and not known or believed to be insolvent

by its officers and managers, with assets exceeding its liabilities to the extent shown by the testimony in this case, it is not in such a state of insolvency as will preclude its executing a mortgage on its property in good faith to secure a debt of the corporation, **EVEN THOUGH THE DEBT MAY BE ONE FOR WHICH THE DIRECTORS ARE SECURITY.** As the corporation was not insolvent it is unnecessary to examine or decide the question as to the right of an insolvent corporation to prefer creditors, or of a director of such a corporation to secure the debts thereof for which he is personally liable. It follows that a decree of the court below must be affirmed.”

This case was an Oregon case and clearly defines the rights of the directors in giving security for obligations even though the director himself is liable as security for the obligation, and is clearly in point with the case at Bar and gives the Directors the right to mortgage the property of the corporation for existing obligations without consent or approval of the stockholders.

As shown by the testimony of O. B. Setters found on Page 34 of the Abstract of Record the claim of the Appellant was not contracted until the latter part of the year 1921 and long after the making of the assignment to the Astoria National Bank, and that the corporation continued a “going concern” until the first day of June 1922 when it ceased to function by reason of its insolvency and at the time

that it ceased to function an assignment was made to the trustee for the purpose of liquidating its assets for the benefit of the creditors.

Calling the Court's attention to the case of **GARRISON HILTON LUMBER COMPANY vs. HINSON**, found in 140 Pac. Page 633 Sub. Div. Section -3- provides: "A trust fund doctrine as applicable to the assets of a corporation which is a "going concern" does not obtain in this state.

Quoting from the opinion:—

"Whatever opinion may have been originally announced by the Federal and State Courts of this country respecting the Trust Fund Doctrine as applied to a corporation, the legal principle is now established that until a corporation has either suspended its business or has become insolvent and its assets have been placed in possession of a court of equity for administration and are in the course of Final Settlement and Distribution the capital stock of the corporation does not constitute a Trust Fund upon which the general creditors have a lien for the payment of their demands."

There are many cases that could be cited from other states but the foregoing rule seems to be the established law and practice of the State of Oregon. We therefore contend that the Directors had full authority to make the assignment of the stock subscriptions as they did, and that the claim of the Astoria National Bank is a preferred claim against the unpaid subscriptions.



Taking up the matter of the assignment of the assets of the corporation to O. B. Setters on or about the first day of June 1922, which was done at a time when the Directors of the corporation had determined that it was impossible for the corporation to long function, the evidence shows that at that time the company had no assets other than the unpaid subscriptions and any assignment made to O. B. Setters of such subscriptions could not be other than subject to the rights of the Astoria National Bank in said subscriptions, and it has not been the purpose of the stockholders or the said O. B. Setters Trustee to defeat the claim of the Appellant. Our contention all along is that the Astoria National Bank hold a first lien on the unpaid subscriptions to the extent of their claim in the sum of \$5,000.00 and accrued interest thereon which has not been paid, and that after this claim is paid all of the creditors (including the Appellant) should pro-rate equally in the remainder of the assets of the corporation. The corporation ceased to function by reason of the fact that it could not meet its obligations and when the liabilities were far in excess of the assets, (due to the fact that a great many of the stockholders were and are insolvent and that it is and was impossible to collect their subscriptions). The stockholders were brought into this suit as defendants, and are in a limited number and were pre-



sent and agreed to the action of the Board of Directors.

We therefore contend that the decision of the Lower Court was just and strictly in accordance with law and should be sustained by this Court.

Respectively Submitted,

O. B. SETTERS,

Solicitor for Appellees.

Astoria, Oregon.

No. 4070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE PACIFIC TELEPHONE AND TELEGRAPH  
COMPANY (a corporation),

*Petitioner,*

vs.

HONORABLE EDWARD E. CUSHMAN, United States  
District Judge for the Western District of  
Washington, Southern Division.

BRIEF FOR PETITIONER.

OTTO B. RUPP,

POST, RUSSELL & HIGGINS,

PILLSBURY, MADISON & SUTRO,

*Solicitors for Plaintiff.*

W. V. TANNER,

*Of Counsel.*

FILED

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No. 4070

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

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THE PACIFIC TELEPHONE AND TELEGRAPH  
COMPANY (a corporation),

*Petitioner,*

vs.

HONORABLE EDWARD E. CUSHMAN, United States  
District Judge for the Western District of  
Washington, Southern Division.

## BRIEF FOR PETITIONER.

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### Statement.

This is an application for a rule to be issued from this court directed to the Honorable Edward E. Cushman, to show cause why a writ of mandamus should not issue commanding him to vacate an order made by him on July 9, 1923, in a cause brought by the petitioner herein against the Department of Public Works of Washington, an administrative regulatory body created by the laws of that state, and the attorney-general of the State of Washington, to hear and determine a motion to dismiss the bill of complaint filed in the case just mentioned, which motion Judge Cushman has heretofore refused to hear, and in the event that after a hearing such motion is denied, to make an order re-

quiring the defendants above named to file an answer to the bill of complaint.

We shall endeavor here to set forth concisely the facts which give rise to this controversy.

The petitioner (hereinafter referred to as the "company") is engaged in a general telephone and telegraph business in the State of Washington and elsewhere; the rates it charges for telephone service are subject to regulation by the State of Washington. On August 8, 1919, the Public Service Commission of that state, now the Department of Public Works (hereinafter referred to as the "department") made an order prescribing the maximum rates to be charged by the company for its service, both exchange and toll, in Washington. These rates so prescribed remained in effect until September 20, 1922, when the company filed a schedule advancing all its *exchange* rates in the State of Washington. Four days later the department issued an order suspending, for the full statutory period, the operation of these increased rates and directing the company to file a new toll rate schedule conforming in principle with the toll rates which had been effective prior to the war period.

On October 5, 1922, the company filed, as directed, the toll rate schedule and withdrew and cancelled the exchange rate schedule filed on September 20th except the rates and charges applicable to the cities of Seattle and Tacoma. In effect, what the company did on October 5th was to file a schedule increasing the exchange rates in Seattle and Tacoma and, under certain circumstances, toll rates throughout the state, but leav-

ing all the other exchange rates the same as they had been since August, 1919.

Thereafter hearings were held by the department at various times and places throughout the state.

On March 31, 1923, the department made an order, one member, the Supervisor of Public Utilities, dissenting, whereby the application of the company for increased rates in Seattle and Tacoma and for a new toll rate schedule was denied.

This order was preceded by certain findings of fact made by the department, the first one of which purports to determine the value of the used and useful property of the company in the state.

Parenthetically, it may be said that the statutes of the State of Washington, as construed by the Supreme Court of that state, provide that if the regulatory body of the state has once valued the property of a utility, the value of the property of such utility at any subsequent date is to be determined by adding to the original valuation the net additions and betterments since made to that property. Inasmuch as the company's property had been valued in 1914, the department followed the course prescribed by the statute as construed by the Supreme Court. In short, it determined the value of the company's property by adding to the original valuation in 1914 the net additions and betterments made to that property since that date.

Under the statutes of the State of Washington, when the department has made an order relative to *value*, the public service company affected, *and that company*

alone, may seek a review of the valuation order in the courts of the State of Washington, but when the department has made an order relative to *rates*, any complainant, or the public service company affected by such order, may seek a review of such order in the courts of the State of Washington. In each instance the review must be sought within thirty days after service of the order.

The company did not sue out a writ of review within thirty days, as provided by the statutes of the State of Washington, nor has it ever brought any proceedings in the state court attacking the order of March 31, 1923. It did, however, on April 24th file a bill in the United States District Court for the Western District of Washington, Southern Division, over which Judge Cushman presides, in which it alleged, *inter alia*, the filing of the rate schedule of August 8, 1919, the filing of the rate schedule of September 20, 1922, the suspension of this schedule by the department, the filing of the schedule of October 5, 1922, and the making of the order by the department of March 31, 1923. It further alleged that the cost of its property in the State of Washington and the cost of its property in the Cities of Seattle and Tacoma was substantially the rate base fixed by the department in its order of March 31, 1923; that these amounts were, for the state, the sum of \$29,347,254.00, for Seattle \$17,023,372.00, and for Tacoma \$2,888,021.00. It then alleged that the fair value of its property in the state was \$35,616,896.00, in Seattle \$20,852,067.00 and in Tacoma \$3,457,290.00; that under the schedule of rates in effect during the year



1922, and which schedule was continued in effect by the order of the department of March 31, 1923, the company had earned upon the *cost* of its property in the state 3.17%, in Seattle .19% and in Tacoma .89%, and that upon the *fair value* of its property under such schedule it had earned in the year 1922 in the state 2.58%, in Seattle .15% and in Tacoma .75%; that if the order of March 31, 1923, was enforced, it would be prevented from earning any return in excess of 2.11% per annum upon the fair value of its property in the state and .54% *loss* per annum upon the fair value of its property in Seattle and .56% upon the fair value of its property in Tacoma. It prayed, therefore, that the rates prescribed in the order of March 31, 1923, be decreed to be confiscatory, in violation of the Constitution of the United States, and that it be permitted to put in force the schedule of rates found by the dissenting member of the department to be just and reasonable, until such time as just and reasonable schedules of rates and charges were established according to law.

On the same date that the bill was filed, the company applied to Judge Cushman for a temporary restraining order, the nature of which is set forth in paragraph V of the petition in this proceeding, which was granted on the same day. Subpoenas were issued on that date and served on the defendants on April 25, 1923. Jurisdiction of the United States District Court over the cause had therefore fully vested on April 25th.

On April 27th, the City of Seattle sued out a writ of review in the Superior Court of the State of Washington, for Thurston County. Since the City of Seattle



had filed a complaint before the department of Public Works, alleging that the rates charged by the company in the City of Seattle were unreasonable, it may be conceded that it had a right to attack the order of March 31, 1923, inasmuch as that order was a rate order. The city, however, in that proceeding attempted to attack the valuation made by the department of the company's property. This, it may not do, as the statute does not give it such a right.

It will at once occur to the court that the proceeding brought by the City of Seattle is not such a proceeding as is described in the amendment of March 4, 1913 (37 Stat. L. 1013), to Section 266 of the Judicial Code, the effect of which would be to stay all proceedings in the suit brought by the company in the United States District Court, for this proceeding was *not* brought to *enforce* the order, but to *attack* it; nor was the order of March 31st stayed by any order in the Thurston County case.

The application for an interlocutory injunction came on to be heard before Judge Gilbert, Judge Cushman and Judge Neterer on April 30th. At that time the department and the attorney-general filed three motions, one to dismiss the complaint, another to dissolve the restraining order, and the third to stay all proceedings in the suit instituted by the company in the United States court on April 24th, because the City of Seattle had brought a proceeding in the state court.

After argument was concluded on April 30th, the three-judge court filed an order dissolving the restrain-

ing order, denying the interlocutory injunction, and stating that an opinion would be filed later.

The opinion was filed on May 23, 1923. It holds, as we understand it, that the proceeding instituted by the City of Seattle in Thurston County was not one brought to enforce the order of the department of March 31st, and therefore does not fall within the amendment to Section 266 of the Judicial Code; that the suit brought by the company on April 24th in the United States court was not prematurely brought because the company did not apply for a rehearing before the department; that under the statutes of the State of Washington, the courts of that state, in reviewing a *rate* order, act in a *judicial* capacity, because the court is given no power by that section of the statute relating to the review of a rate order, to make its own findings or fix rates, and consequently, so far as the rate provision of the order of March 31, 1923, was concerned, the suit in the United States court was not prematurely brought. It holds further, however, that the complaint filed in the United States court shows that there is a controversy as to the value of the property of the company; that under the statutes of the State of Washington the Superior Courts and the Supreme Court of that state "have legislative authority in determining the rate base, superior to that of the department," and that

" 'considerations of comity and convenience' require the court to hold that until plaintiffs have exhausted their right to relief in the superior and supreme courts,—relief, in part at least, legislative in character,—these causes must be stayed."

The court apparently considered the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, to be controlling.

The court further held that if the company applied for a stay of the enforcement of the order of the department of March 31st, in the proceeding brought by the City of Seattle in the Thurston County court, and that court denied a stay and such denial was affirmed by the State Supreme Court, then the company might renew its application in the United States court for an interlocutory injunction. As we shall hereinafter point out, neither the Superior Court of Thurston County nor the Supreme Court of the State of Washington could grant the company a stay, nor would such stay be of any advantage whatsoever to the company if granted.

On July 5, 1923, the company filed a motion in the United States District Court, for the Western District of Washington, Southern Division, for an order requiring the department and the attorney-general to file, forthwith, an answer to the bill of complaint, or in default thereof that a decree *pro confesso* be entered against the department and the attorney-general. On July 9, 1923, after argument, the court declined to consider or pass upon the motion to dismiss the bill of complaint filed by the defendants on April 30th, and denied the motion to require the defendants to answer, specifically basing his ruling in both instances upon the reasons set forth in the opinion filed on May 23, 1923.

On August 2, 1923, this application was made to this court.

### Argument.

The first question is, was the court justified in making the order of July 9, 1923, by which it denied the company's motion to compel the defendants to answer and refused to pass upon defendants' motion to dismiss the bill of complaint.

The action of the three-judge court in denying the interlocutory injunction is not before this court. The reasons it gave for its action may have been good or bad. With those reasons we are not now concerned, except in so far as they have been adopted by Judge Cushman as the reasons for his order of July 9, 1923. If, by the adoption of such reasons as the reasons for not hearing and determining this case on its merits, Judge Cushman has prevented or may have prevented this court from ever hearing and determining this case, then, it is the right and duty of this court, in aid of and as an auxiliary to its appellate jurisdiction, to compel him to hear and determine the case.

We think it may fairly be said that the basis for Judge Cushman's action is that he considered the case of *Prentis v. Atlantic Coast Line Co.*, 211 U. S. 210, to be controlling.

It was held in that case that where the *reduced* fares prescribed had *not* taken effect and probably would not take effect until a state appellate court could, on appeal from the order of the Virginia Commission, perform its legislative function of finally fixing fares, "considerations of comity and convenience" required that the utility company should delay its application to the



United States court for relief until the legislative issues raised by those appeals, were decided or it became reasonably certain in some other way, as by dismissal of the appeals, that the prescribed fares would be put into operation. Legislative power had been imposed by the Constitution of Virginia upon its state courts. The order of the commission, therefore, was not the final legislative act. Moreover, in that case the property of the railway company had not as yet been confiscated. Its property would be confiscated only in the event that the reduced fares were finally put in operation.

The *Prentis* case is not applicable for several reasons:

First, the Washington state law expressly forbids a stay;

Second, legislative power cannot constitutionally be vested in the Washington state courts;

Third, in this case the legislative process is complete; and,

Fourth, where the utility is suffering daily from confiscation, it is not necessary that the legislative process be complete before resort is had to the United States courts.

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**(1) THE WASHINGTON STATE LAW EXPRESSLY FORBIDS  
A STAY.**

It would be useless for the company to ask either the Superior Court of Thurston County or the Supreme Court of the State of Washington to stay the enforcement of the order of March 31st, because the state courts are expressly prohibited by statute from staying



the enforcement of the order made on March 31st. The rates approved by the department in its order of March 31st had been put in effect originally on August 1, 1919. The rates, therefore, had, on March 31, 1923, been in effect *for more than one year*. On October 5, 1922, the plaintiffs filed a schedule *advancing* the rates for telephone service in the Cities of Seattle and Tacoma, and toll rates throughout the state. The statute, Section 10429, Remington's Compiled Statutes, 1922, provides:

“That when any rate has been in force for any length of time *exceeding one year* and such rate is *advanced* by the Public Service Company, and the order of the Commission reinstates such prior rate in whole or in part, *no supersedeas* shall be *allowed* in any case from such order pending the final determination of the cause in the Superior Court, or if appealed to the Supreme court, by such Supreme court.”

It is manifest, therefore, that even though the company had, within the time fixed by statute, instituted review proceedings in the Superior Court of Thurston County, neither that court nor the state Supreme Court would have been empowered to grant relief until after the final decision of the case upon its merits by the Supreme Court. Since any application to the state court for a stay must be not only futile, but also one which the company has not the legal right to make, the company should not be required to make it as a condition precedent to its resort to the United States court.

If it be argued that the state courts have inherent power to grant a stay, we reply that the state courts,

acting in a *legislative* capacity, have no such power. Hence, if they do have inherent power to grant a stay, they have it solely in the exercise of their general *judicial* power. But we may not safely apply to the state courts, acting in a purely judicial capacity, for relief. *Detroit & Mackinac Ry. Co. v. Michigan R. R. Comm.*, 235 U. S. 402.

Moreover, there is no relief, either immediate or final which the company can obtain from the state courts.

*No immediate relief*, because the only immediate relief would be a stay of the order of March 31st. But of what possible advantage would a stay of that order be to the company? In those cases where a regulatory body has made an order reducing rates and charges which had theretofore been in effect, a stay of that order does continue in effect a rate higher than the one prescribed by the regulatory body. In this case, however, it is asserted, and that is the basis of the bill of complaint, that the rates which had been in effect prior to the order of March 31st and which that order continued in effect, were confiscatory. A stay of the enforcement of that order, therefore, does but keep the confiscatory rate in effect.

*No final relief*, because in the review proceedings brought by the City of Seattle, the only possible decision the state court can make is to hold either that the order of the department of March 31st was correct or that the department made an error in that order to the disadvantage of the City of Seattle, which error, when corrected, will result in still lower rates in the City of Seattle.

We say this because the company not having within the time provided by statute, instituted a review proceeding, it cannot under the statutes of the State of Washington obtain any affirmative relief whatsoever in the state court.

We think it therefore clear that Judge Cushman has in effect held that he will not hear and determine the case brought before him until such time as the company has performed an impossible condition.

This court has the right and power, and it is its duty, to hear and determine the case on its merits. But so long as Judge Cushman interposes an insurmountable obstacle to the hearing and determination of the case before him, this court can neither exercise this right, nor perform this duty.

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**(2) LEGISLATIVE POWER CANNOT CONSTITUTIONALLY BE VESTED IN THE WASHINGTON STATE COURTS.**

By the Constitution of Virginia, the legislative function of establishing rates for public service companies was imposed upon the Court of Appeals of that state.

No such provision, however, is found in the Constitution of the State of Washington. If, therefore, under that constitution, legislative power cannot be imposed on the courts of that state, then a statute purporting to impose such power is unconstitutional and void.

The three-judge opinion holds that Section 10441 of Remington's Compiled Statutes, 1922, imposes upon the state courts of Washington the legislative power of determining the value of the property of public service

companies operating in that state. But if this is the effect of that section then it is void, because it is beyond the power of the legislature in the State of Washington to impose such a power or function on the courts of that state.

In the case of *Helena Water Co. v. City of Helena*, 277 Fed. 66, 68, it was held that a statute of Arkansas which attempted to empower a state circuit judge to determine on appeal from an order of a municipal council or city commission what rates would afford a utility valid and reasonable compensation, was void in that it attempted to confer upon the courts of Arkansas a non-judicial function or power. The court said:

“In view of these provisions of the Constitution and its construction by the court of last resort of the state, the court is of the opinion that the proceeding under section 19 of the act, although denominated ‘an appeal’, is in fact so far as it applies to the sufficiency of the rates, a judicial proceeding, and, if the necessary facts authorizing a national court to assume jurisdiction exist, it is its duty to exercise it, when invoked. (Citing cases.)

“But the power of the court to establish rates for the future is clearly a *legislative* act, and, *under the Constitution of the state, cannot be conferred on the judiciary department, and is therefore unconstitutional.*” (Citing cases.) (Italics ours.)

While the Arkansas and the Washington Constitutions differ somewhat in expression as to the separation of legislative and judicial powers, the provisions of the Washington Constitution are as effective a separation of legislative and judicial powers as if the constitution had expressly declared that they were to be kept separate.



In *Oregon R. R. & Nav. Co. v. Campbell*, 173 Fed. 957, 967, Judge Wolverton said:

“Under the state constitution, the powers of government are divided into three separate departments, namely, the legislative, the executive (including the administrative), and the judicial; and no person charged with the official duties under one of these departments is competent to exercise any function of the other, except as provided in the Constitution itself. Section 1, art. 3, Const. Or. This is an express declaration of the segregation of the powers of government. The Constitution of the United States *as effectively segregates* such powers of government, but without an express declaration to that effect. That instrument provides (section 1, art. 1), that ‘all legislative powers herein granted shall be vested in a Congress of the United States;’ (section 1, art. 2) that ‘executive power shall be vested in a President of the United States;’ and (section 1, art. 3) that ‘the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish.’

“Thus it is that, while the powers of government under the national Constitution are actually apportioned to or divided into three departments, *there is no express declaration* that they shall be so apportioned or divided. The thing is done by establishing, severally, each of the three departments of government, and *they are as effectually separate departments as if the Constitution had in so many words so declared as does the State Constitution.*” (Italics ours.)

*The Public Utilities Com. of Dist. of Columbia v. Potomac Electric Power Company, et al.*, 43 U. S. Sup. Ct. Reporter, 445 (decided April 9, 1923);



- State ex rel. Godard v. Johnson*, 61 Kan. 803,  
60 Pac. 1068;  
*Ex parte Riebeling*, 70 Fed. 310;  
*Steenerson v. G. N. Ry. Co.*, 69 Minn. 353, 72 N.  
W. 713, 716;  
*State v. G. N. R. R. Co.*, 130 Minn. 57, 153 N. W.  
247, 248;  
*State v. Barker*, 116 Iowa 96, 89 N. W. 204, 208,  
93 Am. St. Rep. 222, 231;  
*Norwalk Street Railway Company's Appeal*, 69  
Conn. 576, 37 Atl. 1080, 39 L. R. A. 794;  
*Thompson v. Redington*, 110 N. E. 652;  
*Nebraska Telephone Co. v. State*, 55 Neb. 627,  
76 N. W. 171, 174;  
*State Racing Com. v. Latonia Agricultural Asso.*,  
136 Ky. 173, 123 S. W. 681, 25 L. R. A. N. S.  
905, 914;  
*City of Boston v. City of Chelsea*, 212 Mass. 127,  
98 N. E. 620;  
*Butler v. State*, 97 Ind. 373;  
*United Fuel Gas Co. v. Public Service Com.*, 73  
W. Va. 571, 80 S. E. 931, 934;  
*In re County Comrs.*, 22 Okl. 435, 98 Pac. 557, 561;  
*Auditor of State v. Atchison T. & S. F. R. Co.*,  
6 Kan. 301;  
*Board of Supervisors v. Todd*, 97 Md. 247, 54 Atl.  
963.

It has been consistently held by the Supreme Court of Washington that legislative power may not be imposed upon the courts of that state.

In *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 110, the court said:

“We hold that a *judicial* court cannot exercise legislative functions and that the *legislature* cannot impose such power upon it.”

In *Spokane v. Spokane & Inland Empire R. Co.*, 75 Wash. 651, 659, the rule was again stated:

“This is an attempted delegation of police and legislative power. The city cannot confer its power of eminent domain, upon which it must rest its power to change the grades of its streets, upon these railway companies, nor can it throw upon the courts the burden of determining in what proportion the companies shall share the financial burdens. *No such power is vested in the courts of this state, as the power sought to be conferred is in no sense a judicial power, but a power which can only be exercised by the city through its duly constituted authorities.*” (Italics ours.)

In *State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500, the court said:

“Manifestly, it is wholly impractical and *beyond the proper sphere* of the courts to assume to control in any degree this purely nonjudicial duty of the commission. Any attempt on the part of the courts to do so would, it seems clear to us, be to enter the field of executive and administrative duties. *Such would be clearly subversive of our theory of government.*” (Italics ours.)

We quote from *In re Bruen*, 102 Wash. 472, at page 478:

“These functions being essentially judicial and inherent in the courts, we are of the opinion that the

legislature has attempted to create a judicial tribunal which, at the same time, has administrative and delegated legislative powers. Such a system is not warranted under our constitutional form of government. The *legislative*, executive, and judicial functions have *been carefully* separated and, notwithstanding the opinions of a certain class of our society to the contrary, the courts have ever been alert and resolute to keep these functions properly separated. To this is assuredly due the steady equilibrium of our triune governmental system. The courts are jealous of their own prerogatives and, at the same time, studiously careful and sedulously determined that neither the executive nor legislative department shall usurp the powers of the other, or of the courts." (Italics ours.)

See also:

*State ex rel. O. R. & N. Co. v. Commission*, 52 Wash. 17, 26, 32; affirmed by the United States Supreme Court in *Washington ex rel. O. R. & N. Co. v. Fairchild*, 224 U. S. 510, 524, 526; *Selde v. Lincoln County*, 25 Wash. 198, 206.

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(3) **THE LEGISLATIVE PROCESS OF RATE MAKING IS COMPLETE.**

(A) If we assume for the sake of argument only, that (a) legislative power may be imposed upon courts in the State of Washington, and (b) that the Washington state courts may determine value in accordance with the principles enunciated by the United States Supreme Court (which as a matter of fact they may not do), nevertheless the rule laid down in *Prentis v. Atlantic*

*Coast Line Co.*, 211 U. S. 210, has no application because the legislative process in this particular controversy is now complete.

This is clear from the following facts:

The order determining value was made on March 31, 1923. The company, *but no one else*, had the right to seek a review of the order determining value. Paragraph XIV of Section 10,441 provides that

“any *company* affected by the findings, or any of them, believing such findings, or any of them to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted, or unjust, may institute proceedings in the Superior Court of the State of Washington in the county in which the hearing has been held.”

And paragraph XV of the same section provides that

“said public service company, or the commission, shall have the right to appeal from the decision of the Superior Court to the Supreme Court of the State of Washington as in civil cases.”

But the company did not, within thirty days, sue out nor has it ever sued out a writ to review the order of March 31st. The company, therefore, cannot, in any case now pending in the state courts of Washington, have the findings of the department relative to value, reviewed, nor can it now commence any proceeding by which such findings may be reviewed.

The Cities of Seattle and Tacoma cannot have such findings reviewed, for the statute withholds from them the right to seek a review of the department's findings of value. This is manifest, not only from the express



wording of the statute, but also from the construction placed upon the statute by the Supreme Court of the State of Washington in the recent case of *Everett v. Department of Public Works*, 25 Wash. Dec. 357, 359 (decided June 22, 1923). The court there said:

“It is plain that a complainant may have a review as to some findings or orders made by the department, but §10,441 is specific to the effect that *only the public service company* affected may have a review of the questions directly affecting the valuation of its property. What purpose the legislature had in making the distinction noted in these two sections, is not for us to discuss. The wording of the statute is plain and we are bound by it.”

(B) Section 10,441 provides for a general investigation and the making of findings concerning matters material to the determination of the valuation of a public utility. These findings may be reviewed and corrected by the courts, and as made or corrected “when properly certified under the seal of the commission” are “admissible in evidence, in an action, proceeding or hearing”, and are “conclusive evidence of the facts stated in such findings as of the date therein stated under conditions then existing”.

The findings relative to the value of the company's property which were introduced in evidence in the hearing of 1923 before the department were made in 1914. These findings were not at that time reviewed and cannot now be reviewed in the state courts.

Conceding, therefore, that legislative power may be imposed upon the courts of Washington, nevertheless there is no opportunity for the exercise of any such



power in this case. The court cannot now review the valuation finding made in 1914 and even though the valuation findings were now subject to review in the state courts, a review of such findings would not affect the rate order of March 31, 1923, which has become final so far as resort to state courts is concerned by the failure to review that order within the thirty day period provided for by the state statute.

The rule that the rate making process may become final so as to permit resort to the United States courts by the failure of the utility to invoke the action of the final state legislative authority under the provisions of the state law, is recognized in the *Prentis* case. The court there declined to proceed until the final action of the legislative authority of the state, namely, the Court of Appeals of Virginia. Attention was directed, however, to the provisions of the Virginia law requiring appeals to be taken within six months from the date of the order of the primary regulatory body, and to the fact that it might be found in that case that it was too late to appeal. The court, in consequence, declined to dismiss the bills, holding that they should be retained to await the result of the appeals "if the companies see fit to take them", and that "if the appeals are dismissed as brought too late, the companies will be entitled to decrees".

In the case now before this court, the company has failed to institute any proceedings whatsoever in the state courts. The time within which such proceedings might have been begun expired on April 30th, the day on which the application for an interlocutory injunction

was argued. The company can obtain no relief, as we have shown, from the confiscation of its property in the suit brought by the City of Seattle.

Conceding, therefore, for the moment, that in respect to valuation findings, the state courts of Washington do possess legislative power, nevertheless the proceedings in this case have reached the judicial stage within the rule announced in the *Prentis* case.

(C) The controversy between the company and the department is whether the value of the company's property is to be determined in accordance with the principles enunciated by the United States Supreme Court or in accordance with a statute of the State of Washington which is in conflict with these principles.

The United States Supreme Court has decided time and time again that the value of the property of a public utility is to be determined as of the time when the inquiry regarding rates is made. We need cite on this proposition only the two recent cases of *State of Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 43 Sup. Ct. Rep. 544, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 43 Sup. Ct. Rep. 675.

Neither the department nor the Superior Court of Thurston County, nor the Supreme Court of the State of Washington, assuming that these courts act in a legislative capacity, can, under the laws of the State of Washington as interpreted by the Supreme Court of that state, fix the value of the property of a public utility

as of the time of the inquiry concerning rates, if as here there has been a previous valuation of the property of the utility. We say this because the Washington State Supreme Court in *State ex rel Spokane Gas, Light Company v. Kuykendall*, 119 Wash. 107, has construed Section 10,441, Remington's Compiled Statutes, 1922, as meaning that when the department has once valued the property of a public utility, the value of such property at any subsequent date is to be arrived at by adding to the original valuation the net additions and betterments made to that property since the original valuation.

At the time of the hearings in 1923, before the department, the findings made in 1914 were supplemented by evidence showing the net additions and betterments made to the property since 1914. This was done for the purpose of bringing the valuation, made in 1914, down to date, as clearly appears from the following excerpt from Finding No. 1 of the findings made by the majority members of the department and a similar finding made by the dissenting member of the department in his opinion:

"As to the value of the Pacific Company's plant in Washington, the procedure was merely to bring up to date the valuation made in 1914 by the Public Service Commission, adding thereto the net additions and betterments from December 31, 1914, to June 30, 1922."

(Page 74 of exhibit "D" to bill of complaint and page 115 of exhibit "E" to bill of complaint, which said bill of complaint is exhibit "A" attached to the petition.)

It is a matter of common knowledge, of which this court will take judicial notice, that there has been a great advance in prices at least since the year 1916. It is obvious, therefore, that the department could not take present prices into consideration, in determining the value of the whole property, and it is equally manifest that the state courts, under the rule laid down in the *Spokane Gas Company* case, will not consider present prices except in so far as they are reflected in the company's property which has been installed since the rise in prices was experienced.

As shown by the bill of complaint, the value found by the department is substantially the same as the original cost of the property to the company. If the company, therefore, had gone into the state court, the controversy before that court would, as to value, be solely whether value is to be entirely based upon the original cost of the property or whether value is to be determined as of the time when the inquiry regarding rates is made. We say that

“the property is held in private ownership, and that it is *that property* and *not* the original cost of it of which the owner may not be deprived without due process of law.” (*Minnesota Rate* cases, 230 U. S. 352, 434.)

But surely the determination of the question as to whether value is to be determined solely from a consideration of original cost, or whether original cost is but one of the elements which enter into the determination of what is the value of the property at the time the inquiry is made, is purely a *judicial* question.



(D) Again, assuming for the sake of argument only, that legislative power may be imposed upon the state courts of Washington and that the courts of that state may apply the rule prescribed by the United States Supreme Court for determining value, nevertheless in deciding whether in any particular controversy the court is acting judicially or non-judicially, the test to be applied is that "The nature of the final act determines the nature of the previous inquiry". (211 U. S. 227.)

If there is a commission empowered to determine value in the exercise and aid of its general authority, independent of a rate proceeding, then the action of a reviewing court, having the power to substitute a different value, might be considered legislative. But if a court is reviewing the valuation in a rate case in order to determine whether the rates prescribed by the regulatory body are confiscatory or not, the action of the reviewing court is judicial, unless it has authority to substitute other rates for those found by the regulatory body, which the courts of the State of Washington may not do.

In the case at bar, the order of March 31st establishes certain rates. If that order were reviewed in the state courts, those courts could not fix a new rate. The final act which that court might perform would necessarily be the act of declaring whether the rates were reasonable or not, and as the nature of the final act was judicial it makes the "nature of the previous inquiry" judicial.



- (4) WHERE THE UTILITY IS DAILY SUFFERING CONFISCATION, IT IS NOT NECESSARY THAT THE LEGISLATIVE PROCESS BE COMPLETE BEFORE A RESORT IS HAD TO THE UNITED STATES COURTS.

The *Prentis* case is based upon "considerations of comity and convenience". These considerations do not require United States courts to defer action, even pending the conclusion of the legislative process of rate making, *in a case where the utility is suffering daily from the confiscation of its property.*

The case of *Oklahoma Natural Gas Company v. Russell*, U. S. Adv. Ops. 1922-1923, p. 395, is directly in point. The Constitution of Oklahoma, like that of Virginia, confers legislative power upon the courts. In that case there had been no final decision of the Supreme Court of the state, which was the last legislative tribunal. The United States Supreme Court held, however, that in view of the fact that the utility was suffering daily from confiscation under the rate to which it was limited, the three-judge court should have heard the application for an interlocutory injunction upon the merits. In support of its conclusions, the court cited *Love v. Atchison etc. Ry. Co.*, 185 Fed. (C. C. A.) 321, which states very clearly the reasons supporting court intervention pending the completion of the legislative process. We quote from the *Love* case (p. 327):

"The legislative function in rate-making looks to the future and determines what future rates shall be. But when rates, either tentative or final, have been put and are maintained in actual operation under penalty of severe fines, the question whether or not their effect is to take the property of the railroad companies affected thereby with-

out just compensation is a judicial one, conditioned by past or present facts, and the national courts cannot be deprived of jurisdiction of it by the fact that the process of making the tentative rates is yet incomplete. It is as clear a violation of the Constitution, and one as promptly remediable in the national courts, to take the property of a railroad company without just compensation by the enforced operation of tentative rates during the process of their making as by the operation of final rates after that process is complete. Railroad companies that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate-making process by provisions of a state Constitution or of a state law, or by orders of a state commission, prescribing tentative rates and putting them in effect during the rate-making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate-making process to the same extent that they may after the process is completed. These suits were not prematurely brought."

The question was again before the Supreme Court of the United States in *Prendergast v. New York Telephone Company*, U. S. Adv. Ops. 1922-23, p. 466, where the court followed and cited with approval *Oklahoma Natural Gas Company v. Russell*, *supra*, and *Love v. Atchison etc. Co.*, *supra*, concluding as follows:

"Upon a showing that such reduced rates were confiscatory, the company was entitled to have their enforcement enjoined *pending the continuation and completion of the rate-making process.*" (Italics ours.)

**THE RULE TO SHOW CAUSE SHOULD BE MADE ABSOLUTE.**

The company filed a bill in the United States district court for the Western District of Washington on April 24th, seeking to enjoin the enforcement of the order of March 31st, which order it claimed to be confiscatory of the company's property.

At the time the company took this action no proceedings of any kind had been brought in the state courts of Washington, nor was any proceeding brought by anyone in the state courts of Washington until two days after service of process had been made upon the members of the department and the attorney general.

The company as a California corporation had the right to invoke the jurisdiction of the United States court on the ground of diversity of citizenship. It also had the right to invoke the jurisdiction of that court upon the ground that the order was confiscatory of its property, and therefore in violation of the constitution of the United States.

That it had a right to invoke the jurisdiction of the United States court is clear.

In *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 40, the court said:

“When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction, and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal court.

*The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.*" (Italics ours.)

In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 228, the court said:

"Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate and the proportion between the two—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. *They are not to be forbidden to try those facts before a court of their own choosing if otherwise competent.*" (Italics ours.)

See also:

*Ex parte Young*, 209 U. S. 123, 144;

*Louisville & Nashville R. R. Co. v. Garrett*, 231 U. S. 298, 311;

*Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, 660.

The company, therefore, had the right, after the issuance of the order of March 31st, to go either into the state court or into the United States court. It chose the last named.

We do not understand that the *nisi prius* judge questioned our power to choose between these two courts, but his action deprives us of the *exercise* of our right of choice. We say this, because he has stayed all proceedings in the suit brought in the court presided over by him until such time as the company



applies for a stay of the enforcement of the order of March 31st in the state court, which stay can not be granted by that court.

But the right to resort to the United States court is an empty right if that court refuses to act. The purpose of all judicial proceedings is to obtain a judgment or decree determining the rights of the parties to the action or suit. The right to file a bill is but the shadow of a right unless the court will proceed to act and enter a decree.

Moreover, as we have shown, the state court has no power *under the statute* to grant a stay of the enforcement of the order of March 31st. If it has the right, therefore, to grant a stay, it grants such a stay in the exercise of its inherent judicial power. Hence, if the company applies for a stay it must, knowing the law, be deemed to have invoked the judicial power of the state court. But if the company once invokes the judicial power of the state court, there certainly is danger that the final decision in the case now pending in Thurston County will be deemed to be *res judicata*, at least so far as the rates applicable to the City of Seattle are concerned, and, in consequence, the District court and this court will be deprived of the right to determine whether the rates applicable to Seattle are confiscatory or not.

*Detroit etc. v. Michigan R. R. Com.*, 235 U. S. 402.

In that event this court can never exercise its undoubted right to hear this case on appeal. That being



so, this court will make the rule absolute in aid of and as auxiliary to its appellate jurisdiction.

In *McClellan v. Carland*, 217 U. S. 268, 280, a suit had been brought in the Circuit Court of the United States, praying an adjudication by that court that the complainants in such suit were the sole heirs at law and next of kin of one John C. McClellan, deceased. The defendant in that suit, one Blackman, the special administrator of the estate of McClellan, deceased, filed an answer in the suit. Thereafter the attorney general of South Dakota asked leave to intervene in the case, and, upon hearing, the circuit court overruled the motion and ordered that the further prosecution of the action in the United States court be stayed for the period of ninety days, for the purpose of allowing the State of South Dakota to commence an action of escheat in the state courts of that state, and in the event that such action was commenced within that time, then the pending action in the United States court to be stayed until the determination of such action brought by the State of South Dakota. The complainants filed a motion to vacate the order staying the proceedings in the United States court. Upon the denial of this motion a petition for mandamus was filed in the Circuit Court of Appeals, and, subsequently, the petition was denied. A writ of certiorari was then sued out to the United States Supreme Court. That court said:

“But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the

appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below. \* \*

“Inasmuch as the order of the Circuit Court staying the proceeding until after final judgment in the state court *might* prevent the adjudication of the questions involved, and thereby prevent a review thereof in the Circuit Court of Appeals, which had jurisdiction for that purpose, we think that court had power to issue the writ of mandamus to require the Circuit Court to proceed with and determine the action pending before it. \* \* \*

“So far as the record presented to the Circuit Court of Appeals shows, the only ground upon which the Circuit Court acted in postponing the suit was because the State of South Dakota, which had applied to be made a party, and which application was denied, was about to begin a suit in the state court to determine an escheat of the estate of John C. McClellan, therefore the action was stayed, first, until the beginning of such suit, and then until it was determined. It, therefore, appeared upon the record presented to the Circuit Court of Appeals that the Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do. *Chicot County v. Sherwood*, 148 U. S. 529, 534.

“It cannot be denied that a Circuit Court of the United States, like other courts, had power to postpone the trial of cases for *good* reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res judicata*, and thus prevent further proceedings in the Federal court.” (Italics ours.)

But the writ of mandamus is allowable not only in those cases where a final decree in a state court might become *res judicata*, and thus render ineffectual a resort to the courts of the United States, but also in those cases where, for erroneous reasons, proceedings in a court of the United States have been stayed, or the court has refused to proceed with convenient speed to try and determine the controversy, thus preventing a *seasonable* exercise of the jurisdiction of the appellate court. That this is a correct statement will, we think, be made clear by a few illustrative cases.

In the early case of *Livingston v. Dorgenois*, 7 Cranch. 577, 3 L. Ed. 444, Livingston filed a suit in the district court of the United States, in which he alleged that he was the owner of a certain tract of land in the State of Louisiana; that he had been forcibly dispossessed thereof by the marshal of the District of Orleans, and prayed that he might be restored to the possession of his property. The marshal answered and pleaded in bar that prior to the time he dispossessed Livingston he had received a mandate from the President of the United States, commanding him to remove all persons from the land in question, and that in accordance with such mandate he had removed Livingston and his servants from the property of which Livingston claimed to be the owner. Livingston filed a general demurrer to this answer, but upon the day assigned for argument the United States district attorney moved the court

that the proceedings in the cause be stayed, because the suit was a collusive one.

The district court stayed the proceedings. Thereupon Livingston sued out a writ of error to the Supreme Court of the United States. After argument in the Supreme Court, Livingston dismissed his writ of error, presumably because no such writ would lie, and prayed that a writ of mandamus be issued to the United States district judge, which writ was granted.

In *Ex parte Parker*, 120 U. S. 737, 743, Parker and one Boyer were defendants in an action brought in the district court of the Territory of Washington. A judgment adverse to Parker and Boyer having been rendered by the trial court, Parker sued out an appeal to the Supreme Court of the territory. Parker served a notice upon Boyer, his co-defendant, which the Supreme Court of the territory held to be insufficient, and dismissed the appeal of Parker. The Supreme Court of the territory also held that the certificate to the transcript of record was not sufficient, and that for that reason also the appeal should be dismissed.

The United States Supreme Court held that Parker had complied with the statute of the Territory of Washington relative to appeals in cases where only one of the defendants desired to appeal, and that the certificate to the transcript of the record was sufficient. It said:

“That writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained



jurisdiction in a cause, it refuses to proceed in the due exercise thereof."

In *ex parte Simons*, 247 U. S. 231, 239, Mrs. Simons brought an action in the District Court of the United States against William Nelson Cromwell and Louis H. Cramer, as executors under the last will and testament of Frank Leslie, deceased. The complaint set forth two causes of action. On motion of the defendant executors, Judge Hough ordered the first cause of action to be transferred to the equity side of the court and docketed as an equity cause, and to be stricken out of the complaint in the action at law. He based his ruling in this regard upon the ground that by the law of the State of New York, Mrs. Simons could not sustain the first cause of action at law. An application for mandamus was made to the United States Supreme Court and granted. That court held that under the law of the State of New York the first cause of action could be sustained at law.

Continuing, it said:

"If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake. It does not matter very much in what form an extraordinary remedy is afforded in this case. But as the order may be regarded as having repudiated jurisdiction of the first count, mandamus may be adopted to require the District Court to produce and to give the plaintiff her right to a trial at common law."



In *Barber Asphalt Pav. Co. v. Morris*, 132 Fed. 945, 955, will be found a somewhat extensive review of the decisions of the United States Supreme Court in which that court has held that a writ of mandamus should issue. After such review the Circuit Court of Appeals for the Eighth Circuit said:

“The action in the Circuit Court to which the application of the petitioner relates is within the appellate jurisdiction of this court. It may be reviewed here by a writ of error to reverse any final judgment that may be rendered in it. The order which stays that action until the final determination by the state courts of the questions it involves prevents both the independent adjudication of those questions by the United States Circuit Court and the review of that adjudication by this court, and thus destroys, or *greatly impairs*, the appellate jurisdiction of this court in that case. The very purpose of the grant to this court of the power to issue the writ of mandamus was to enable it to protect and maintain this jurisdiction, and that grant not only conferred the power, but it necessarily imposed upon this court the duty to issue its writ of mandamus to impel the court below to proceed *with all convenient speed* to the trial and adjudication of the controversy between citizens of different states in which its jurisdiction has been invoked to the end that the appellate jurisdiction of this court over its action may be *seasonably* and effectually exercised.

“Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. *Ex parte Whitney*, 13 Pet. 404, 10 L. Ed. 221; *Ex parte Bradstreet*, 8 Pet. 588,

8 L. Ed. 1054; *Barrow v. Hill*, 13 How. 54, 14 L. Ed. 48. It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. *Kimberlin v. Commission to Five Civilized Tribes*, 104 Fed. 653, 655, 44 C. C. A. 109, 111; *Minnesota Moline Plow Co. v. Dowagiac Mfg. Co.*, 126 Fed. 746, 61 C. C. A. 352. The power to compel such an officer to *proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment.* *Livingston v. Dorgeonis*, 7 Cranch, 576, 588, 3 L. Ed. 444; *Ex parte Bradstreet*, 7 Pet. 634, 649, 8 L. Ed. 810; *New York Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 303, 8 L. Ed. 949; *Ex parte Roberts*, 15 Wall. 384, 386, 21 L. Ed. 131; *Ins. Co. v. Comstock*, 16 Wall. 258, 270, 21 L. Ed. 493." (Italics ours.)

See also:

*United States v. Malmin*, 272 Fed. 785;

*Grable v. Killits*, 282 Fed. 185, 196;

*In re Watts*, 214 Fed. 80;

*In re Grossmayer*, 177 U. S. 48.

We submit that the record before this court shows that on April 24, 1923, the District Court of the United

States acquired complete jurisdiction of the cause instituted on that date by the company; that the company has an unquestioned right to have a speedy and final adjudication of the controversy existing between it and the department; that, for erroneous reasons, the district judge has declined to hear and determine the controversy, and that this court in the aid of its appellate jurisdiction is not only entitled to but has imposed upon it the duty to compel the trial judge to proceed to a trial and determination of the case lawfully brought in the court over which he presides.

Dated, August 15, 1923.

Respectfully submitted,

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No. 4070

IN THE

17  
**United States Circuit Court  
of Appeals**

**FOR THE NINTH CIRCUIT**

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THE PACIFIC TELEPHONE AND TELEGRAPH  
COMPANY (a corporation),

*Petitioner,*

vs.

HONORABLE EDWARD E. CUSHMAN, United  
States District Judge for the Western  
District of Washington, Southern Divi-  
sion.

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BRIEF FOR HONORABLE EDWARD E.  
CUSHMAN, UNITED STATES DISTRICT  
JUDGE FOR THE WESTERN DISTRICT  
OF WASHINGTON, SOUTHERN  
DIVISION.

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OF WASHINGTON, SOUTHERN  
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## STATEMENT.

We believe a brief restatement of the facts will assist an understanding of the issues presented upon the application for mandamus herein. The prayer is for a rule directed to the respondent, requiring him to reverse his decision upon a motion to compel defendants to answer in a proceeding pending before the respondent. The decision of the respondent sought to be changed by rule of this court is one

rested entirely upon the decision of a court of three judges, of which respondent was one, said court having been assembled under the provisions of section 266, Judicial Code. It is not pleaded that respondent took action not in accord in any respect with the decision of the three judges, and on the contrary, the petition and brief of the moving party here are confined almost entirely to an attack upon the reasoning and conclusion of the court of three judges. The decision of the court constituted as provided in section 266 was, in brief, that until the happening of certain events involving a resort to the courts of the state of Washington, and the exhaustion of the relief provided by the laws of said state, proceedings instituted by the filing of the appeal in equity which the court then had under consideration were stayed. It is therefore incorrect to say, without more, as in petitioner's brief, that Judge Cushman had refused to hear the motion to dismiss said appeal, and in case this be denied, to compel defendants to answer.

Although the opinion of the three judges specifically recites that "the question of the rates, whether fair, reasonable or confiscatory in character, has not been considered," petitioner here, by allegations and brief, seeks to bring the merits of this controversy before the court on petition for mandamus. It is clear upon authority that this can not be done, but the attempt imposes upon respondent the necessity of correcting and amplifying certain statements made. On page 3 of the brief of petitioner, certain conclu-

sions are stated with regard to the law of the state of Washington with respect to its application to the property of a public service company, which has been valued originally by the regulatory body. It is stated that "inasmuch as the company's property had been valued in 1914, the Department followed the course prescribed by the statute, as construed by the Supreme Court." In this connection, the attention of the court is called to the findings of fact and order of the regulatory body, which are a part of the record here, as a portion of Exhibit A attached to the petition. An examination of these findings of fact and order will indicate that both the original valuation, brought to date by adding net additions and betterments (the Pacific property) and an original valuation as of the date of the inquiry (the Home property) are dealt with in the findings of fact and order of the Department of Public Works of March 31, 1923; furthermore, it will appear that because of the interrelation of these properties in their operation and maintenance, that correct rate determination requires joint consideration, and solution of the issues presented to the regulatory body was impossible without such joint consideration. The court of three judges state in their opinion:

"The rates to be established for the state must be, to a certain extent at least, interdependent. Yet it would seem that the suit in the Superior Court being brought on relation of the city of Seattle, would not, in the absence of intervention, necessarily be *res judicata* either of the



rates throughout the state, or those of Tacoma or Spokane, yet it is clear that the Department's course in holding that the questions involved would only be satisfactorily determined after 'an investigation and study of the entire system of the Pacific Telephone and Telegraph Company in the State of Washington' was entirely proper."

It therefore follows that the merits (which have not yet been heard) of the proceeding in equity before the respondent necessarily involved both an original valuation, brought down to date with net additions and betterments, and an original valuation as of the date of the order. The character of the entire proceeding before the Department is consequently not fully disclosed by consideration alone of the property and operation of the Pacific Telephone and Telegraph Company, divorced from the property and operation of the Home Telephone and Telegraph Company.

The figures of valuation and rate of return alleged by petitioner and set forth in its brief on pages 4 and 5 thereof, depend upon certain apportionments of cost and expense (which are controverted), and are put in issue by an affidavit of E. V. Kuykendall, omitted from the record brought here by petitioner, but included as Exhibit 11 of our Return.

The statement of the case by petitioner treats the decision of the three judges as having confined the resort of the petitioner to the state courts for relief, to a certain proceeding instituted by the city of

Seattle (petitioner's brief, page 8). The language of the decision indicates that the relief in the state courts is not so restricted, and is as follows:

“While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.”

The statement of the case as made by the petitioner must be supplemented by bringing to the Court's attention the existence of an appeal, as affirmatively alleged in our Return herein. This appeal was taken July 16, 1923. It fully appears from the Exhibits numbered 1 to 7, attached hereto and made a part of our Return herein, that this appeal takes up for review by the Supreme Court of the United States the opinion and order of the three judges.

Solicitors for respondent herein appear by reason of a telegram and two letters attached to and made a part of our Return, and designated as “Exhibits 8, 9 and 10.”

## ARGUMENT.

## (A) THE DEMURRER SHOULD BE SUSTAINED.

The respondent has demurred to the petition herein upon the grounds that this court has no jurisdiction of respondent or of the subject matter of this action and that the petition does not state facts sufficient to constitute a cause of action. In support of this demurrer the following argument is respectfully urged.

The writ of mandamus is a high prerogative writ which will only be issued when the necessity therefor is made clearly to appear to this court, and before the petitioner herein is entitled to such writ, it must fully satisfy this court as to the following conditions:

1. That the respondent herein has failed and refused to perform an act which it was his duty to perform and which the petitioner was entitled to have performed.

2. That the petitioner has no other remedy.

3. That the writ of mandamus is not being sought as a substitute for an appeal or writ of error.

4. That the issuance of the writ is necessary and auxiliary to the appellate jurisdiction of this court.

5. That the writ, if issued, will afford the relief sought.

These several points will be discussed in their respective order.

## I.

THE RESPONDENT HEREIN HAS NOT FAILED OR  
REFUSED TO PERFORM ANY JUDICIAL ACT  
WHICH IT WAS INCUMBENT UPON  
HIM TO PERFORM.

This is a proceeding to obtain a writ of mandamus directed against the respondent as judge of the District Court of the Western District of Washington, Southern Division, to require him to set aside and vacate a certain order of July 9, 1923, and to hear and determine a motion to dismiss, filed by the Department of Public Works of the State of Washington as defendants in a certain action pending before respondent, in which the petitioner herein is plaintiff, and in the event said motion to dismiss is denied, to require the said defendants to file an answer to the bill of complaint in that suit. This proceeding can have nothing to do with the merits of that suit, but the proceedings heretofore had in that suit must at all times be borne in mind in discussing the right to a writ of mandamus herein. In that suit, the relief sought by the petitioner was of such a nature as to bring it within the provisions of section 266 of the Judicial Code and the application of the petitioner for a preliminary injunction was accordingly heard before the special tribunal of three judges, one of whom was a member of this court and one the respondent herein. Respondent having been a member of this special tribunal, is fully cognizant of the con-



clusions reached by such three judge court and the reasons therefor. This three judge court on April 30 entered an order dissolving the restraining order theretofore made and denying an interlocutory injunction. On May 23, 1923, this three judge court filed their decision, which decision is set forth in full in the petition herein. Particular attention is called to the following statements in that decision:

“Considerations of ‘comity and convenience’ require the court to hold that, until plaintiffs have exhausted their right to relief in the superior and supreme courts—relief, in part at least, legislative in character, these causes must be stayed.” (Petitioner’s Exhibit “B,” Page 17 of Decision)

“The Pacific Telephone & Telegraph Company is made a defendant in the Thurston County case. While the City of Seattle, plaintiff therein, has not secured a stay of the order attacked by plaintiffs herein, and it does not appear that the Pacific Telephone and Telegraph Company has asked for such a stay and been refused, the Superior Court and the Supreme Court of the State of Washington being vested, by section 10441, with legislative authority superior to that of the Department, this suit must be stayed until such time as plaintiffs have sought such relief from those courts under the state law. If denied a stay of the objectionable order by the State court upon such review, and if denied such stay in the Thurston County case now pending, and such denials are affirmed by the State Supreme Court, the applications herein for a preliminary injunction may be renewed.” (Petitioner’s Exhibit “B,” Page 19 of Decision)



Petitioner, throughout its brief filed herein, bases its statements of prospective relief entirely upon the Seattle case, which is evidently an attempt to confine the relief within too narrow limits, as we will more particularly show hereafter.

From this, it is apparent that the three judge court had reached the conclusion that the petitioner herein had not exhausted its state remedies and that further proceedings must be stayed until such remedies had been exhausted and relief obtained through the state courts or refused by the state courts, in which event petitioner might again apply to the District Court.

Counsel for petitioner contend that the sole power of the three judges was to pass upon the interlocutory injunction, and that the reasons which influenced them in denying such injunction can have no influence on the District Court. We cannot agree with this contention. The three judges determined that upon the broad ground of comity and convenience the Federal Courts will not entertain an application for relief until state remedies have been exhausted. We believe that this conclusion is binding upon the district court. Certainly, if reasons of comity and convenience caused the three judges to deny an interlocutory injunction, the same reasons must apply with equal or greater force upon the District Court. Thus it would seem ridiculous to say that petitioner could not obtain a relief from the three judges because it had not exhausted its state remedies, and yet could ignore the decision of the three judges, decline to

attempt to secure state remedy and proceed as though nothing had heretofore happened to obtain relief in the District Court. We submit that the same reasons which induced the decision of the three judges must control the District Court and that court is without jurisdiction to entertain further proceedings in that suit until the petitioner herein has complied with the requirement of the three judges that they seek state relief, or has obtained a reversal of the decision of the three judges by an appeal to the Supreme Court of the United States.

If it was not within the jurisdiction of the District Court to take further proceedings in that suit, it is not within the power of this court to mandamus respondent to take such action.

And even though it might be held within the jurisdiction of the respondent, it was certainly within the sound judicial discretion of the respondent as to whether or not such proceedings should be taken, and the respondent has exercised his judicial discretion and has found, as stated in the order of July 9, 1923, that the "court declines to pass upon defendant's motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein on May 23, 1923.

That we are correct in our contention that the District Court, after the order of the three judges denying the interlocutory injunction and the decision requiring that proceedings be stayed, the District Court

had no jurisdiction to proceed further in the matter, is fully sustained by the recent decision of the Supreme Court of the United States in the case of *Cumberland Telephone and Telegraph Co. v. Louisiana Public Service Commission*, decided November 20, 1922, U. S. Supreme Court Advance Opinions, 1922-23, page 96; 43 Supreme Court, 75. That case was decided on a motion by the public service commission to set aside a supersedeas and injunction granted by the District Court after the decision by the three judges. After reviewing the purpose of section 266, Judicial Code, the Supreme Court, in the opinion rendered by Mr. Chief Justice Taft, used the following language, which we consider determinative of the question:

“This court had occasion to consider the purport and significance of section 17 of the Act of June 18, 1910, embodied in section 266 in *Ex parte Metropolitan Water Co.* 220 U. S. 539, 55 L. ed. 575, 31 Sup. Ct. Rep. 600, and there held that after a district judge had granted a preliminary restraining order in such a case as provided, the same judge could not set aside his own order, and such act by him was without jurisdiction. This court, therefore, issued a mandamus directing him to annul the order of vacation. We are of opinion that a single judge has no power, in view of section 266, to affect the operation of the order of the court constituted by the three judges, granting or denying the interlocutory injunction applied for. To hold that he may grant a temporary injunction varying the order of the three judges would be to make the legislation a nullity, and work the result which Congress was at great pains to avoid. Arguments to show that the order only

continued the status quo, that a disturbance of it will work irreparable injury, and that the bond herein required secures all parties in interest, are beside the point. This is a question of statutory power and jurisdiction,—not one of judicial discretion or equitable consideration.”

The Cumberland case was cited by the District Court of Florida in the case of *Jacksonville Gas Co. v. City of Jacksonville*, 286 Fed. 404, 408 as follows:

“In *Cumberland Telephone Co. v. Public Service Commission of Louisiana*, 258 U. S. —, 43 Sup. Ct. 75, 67 L. Ed. —, decided by the Supreme Court of the United States November 20, 1922, it was held that the three judges constituting such tribunal as this were vested with the discretion, upon the denial of the interlocutory injunction, to withhold or grant a stay order or supersedeas. Application has been made in this case for such order in the event of denial of interlocutory injunction. Exercising the discretion vested in us, we are of opinion that under all the facts and circumstances it should not be granted.”

Special attention is called to the decision of the *three judges* in the case of *Boston & M. R. R. v. Niles*, 218 Fed. 944. Following the *Prentis* case they decided the state remedies should first be exhausted and concluded the opinion with the following language:

“We are disposed to adopt the course suggested by Mr. Justice Holmes, and *hold this proceeding in abeyance pending results in the state courts*; and it is so ordered.”

This principle that the courts will not attempt by mandamus to require the lower court to do what is not within its jurisdiction to do, or attempt to control the judicial discretion of the lower court is too elemental to require citation.



## II.

PETITIONER HAS OTHER REMEDIES AND IS THEREFORE  
NOT ENTITLED TO MANDAMUS.

The Supreme Court of the United States has repeatedly ruled that mandamus will only be issued where there is no other appropriate relief, and that it will not be issued where there is any other adequate remedy. *U. S. v. Addison*, 22 How. 174, 16 L. ed. 304; *Ex parte Newman*, 14 Wall, 152, 20 L. ed. 877, and other cases cited in 5 Fed. Stat. Ann., 2nd Edition 935. In the suit pending in the district court involved in this proceeding, it is evident from the decision of the three judges that petitioner at all times had and still has two other remedies. In the first place, it could have complied with the requirement of the three judges and applied to the state superior court and the Supreme Court for the relief sought, and in the event of failure to obtain such relief, could have gone back to the Federal Court with a showing that such relief was not available. Or, on the other hand, the statute expressly provides for an appeal direct to the Supreme Court of the United States, and this relief has at all times been open to petitioner, and until either or both of such remedies have been exhausted by petitioner, it has no right to appear before this court and seek relief by mandamus to compel the district court to proceed with the hearing in the face of the decision of the three judges and petitioner's refusal to abide thereby.



As an excuse for petitioner's failure to apply to the state courts, elaborate argument is submitted in the brief of petitioner filed herein to show that the time has expired within which relief could be obtained through the state courts, and that in any event the state courts have no power to afford such relief. As to the second phase, we do not believe that this court can devote any attention to the suggestion that the state courts do not have power to afford relief for the reason that the three judges in their decision have indicated that the state courts apparently have such power and as the decision of the three judges cannot be reversed by this court, it is binding in this proceeding until such time as it might be reversed or modified by the Supreme Court of the United States.

As to the excuse that the petitioner has negligently permitted the statutory time within which application should have been made to the state court to expire, we will say that the Supreme Court of the State of Washington has never passed upon the question of whether or not the thirty-day provision of the statute is mandatory or is a statute of limitations, and if so, if the statute might be tolled by timely proceedings in the Federal Court. Until such time as the supreme court has established such ruling, counsel for petitioner cannot authoritatively state that it cannot seek relief in the state courts, but should make a *bona fide* attempt to secure such relief, and its inability to secure it by reason of lapse of time might then be urged on a renewed application to the dis-

trict court. In this connection alone, we call the court's attention to the case of *Palermo Land & Water Co. v. Railway Commission*, 227 Federal 708, and is not cited to support the contention that a petition for rehearing must be applied for before Federal jurisdiction may be invoked. In that case, which was also a rate case, the California statute provided for an application for rehearing before the State Commission and within a certain time. The water company had neglected to make such application for rehearing, and had sought relief in the Federal Court. With reference to the time feature, the district court said:

"In this case, however, the Commission has expressly declared at the bar and in its brief its readiness to entertain an application for a rehearing of the present order, notwithstanding the lapse of the usual time given for the purpose, and has intimated its readiness to suspend the effect of the order until such petition can be passed upon. Should such application be made, and relief denied for any reason, plaintiff will then be in a position to seek a judicial review of the order; but the present bill must, for the reasons indicated, be regarded as premature."

*Landon v. Court of Industrial Relations*, 269 Fed. 411. This case involved enforcement of certain gas rates involving a certain Kansas statute which required that action to question such rates must be commenced within thirty days. The court stated at page 415:

"As to the 30-day period provided in the Kansas statute above cited, it is sufficient to say that the provision in question has been held by

the Supreme Court of Kansas not to be a statute of limitation. *Aetna Ins. Co. v. Lewis*, 92 Kan. 1012, 142 Pac. 954. See, also, *Emporia Telephone Co. v. Public Utilities Commission*, 97 Kan. 139, 154 Pac. 262. And even if said provision were in the nature of a statute of limitation, nevertheless a court of equity might still entertain a suit of this character even after the statutory period. *Emporia Case*, supra. See, also, *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 232, 29 Sup. Ct. 67, 53 L. Ed. 150."

*Air-Way Electric Appliance Corporation v. Archer*, 279 Fed. 878, involving certain tax statutes of the state of Ohio. The remarks of the court at page 891 are pertinent to this discussion:

"The provisions of the Ohio statute differ in various respects, which need not be detailed, from those of the Virginia Constitution and act under consideration in *Prentiss v. Atlantic Coast Line*, 211 U. S. 210, 29 Sup. Ct. 67, 53 L. Ed. 150: but the rule of comity there observed and the mode of procedure there adopted should, as far as practicable, control here. Whether the action of the plaintiff, after it was notified of the assessment made against it, rose to the dignity of a request or demand for a rehearing before the tax commission, and whether that body, if a request for a rehearing yet be made, will conclude that the request is not timely, or, out of a desire to be accurate and just, will grant a rehearing, regardless of the lapse of time, are questions for the commission to decide. In *Palermo Land & Water Co. v. Railroad Commission* (D. C.) 227 Fed. 708, the defendant in open court offered to entertain an application for a rehearing, although the usual time for applying therefor had expired. In the instant case the defendants have stipulated that the plaintiff's present status, during the pendency of this case and until its deci-



sion, shall be maintained, and that plaintiff shall not be subject to any penalties, fines, or forfeitures by reason of any default on its part in the payment of the tax charged against it. Being thus amply protected, the court need not at this time trouble itself over the question of injunctive relief or render final decision. Pending an application for review before the tax commission and the disposition of the same, the present bill will be retained to await the result of such proceedings. When the conclusion reached is properly presented to the court, it will take such final action as it deems proper."

These three cases are, we think, in point, and it is quite possible that upon a proper effort being made by petitioner to seek relief in the state courts, equally liberal interpretation of the Washington statutes might be secured.

Section 10441, Rem. Comp. Stat., provides in part as follows:

"Any company affected by the findings, or any of them, believing such findings, or any of them, to be contrary to law or the evidence introduced, or that such findings are unfair, unwarranted or unjust, may institute proceedings in the superior court of the state of Washington in the county in which said hearing has been held, or, if held in more than one county, then in the county in which said hearing was commenced, and have such findings reviewed, and their correctness, reasonableness and lawfulness inquired into and determined. Such review shall be heard by the court without the intervention of a jury and shall be heard upon the evidence and exhibits taken before the commission and certified to by it; and the court before which such hearing is had, in case it finds any such findings so sought

to be reviewed unjust, incorrect, unreasonable, unlawful or not supported by the evidence, shall make new and correct findings to take the place of such as may not be sustained, unless such findings are set aside and reversed for error on the part of the commission in rejecting evidence properly proffered in which case it shall remand said hearing to the commission with instructions to receive the evidence so proffered and rejected and make the findings of fact on the evidence so proffered and that already received.

“Said public service company or the commission shall have the right to appeal from the decision of the superior court to the supreme court of the state of Washington, as in civil cases. In case the supreme court finds any findings so sought to be reviewed unjust, incorrect, unlawful or unreasonable, or not supported by the evidence, it shall either make and render proper findings or remand the case to the superior court with instructions to make proper findings on the evidence already submitted, unless the same is reversed for error in rejecting evidence properly proffered in which case the hearing shall be remanded to the commission with instructions to receive the evidence so proffered and make findings on the evidence so proffered and rejected and that already received.”

This was the statute under which the original proceeding before the department of public works was held, according to the opinion of the three judges, and it will be noted that there is no statute of limitations fixing the time when the appeal must be taken, but states that the appeal must be taken as in civil actions which would be ninety days, *State ex rel. Lowry v. Superior Court*, 41 Wash. 450, so that petitioner would still have the right of appeal.



It is evident, therefore, that petitioner has made no attempt to avail itself of its state remedy, but having such remedy, as well as the remedy by appeal, it is not entitled to a writ of mandamus from this court.

### III.

#### THE WRIT OF MANDAMUS CANNOT BE USED AS A SUBSTITUTE FOR AN APPEAL OR WRIT OF ERROR.

It has been repeatedly announced by the Supreme Court of the United States and by Federal state courts that the writ of mandamus cannot be used as a substitute for an appeal on writ of error. *Re Rice*, 155 U. S. 396, 39 L. Ed. 198; *Re Parsons*, 150 U. S. 150, 37 L. Ed. 1034; *Ex parte Harding*, 219 U. S. 363, 55 L. Ed. 252; *Morrison v. District Court of the United States*, 147 U. S. 14, 37 L. Ed. 60.

We believe a candid examination of the brief filed by petitioner herein will show that the real purpose of this proceeding is to obtain a review by this court of the order of the three judges. The major portion of the brief is devoted to a consideration of the merits of the controversy and to a showing of error in the decision of the three judges as to the state remedy available. In fact counsel for petitioner stated in court that the motion to compel defendants to answer was in reality a petition for rehearing. The statute provides for an appeal from the decision of the three judges to the Supreme Court of the United States, and such appeal is exclusive. *Jackson v. Cravens*, 238 Fed. 117. If petitioner is dissatisfied with that

decision, it must obtain a review of the same by the Supreme Court of the United States, and not by application to this court for a writ of mandamus.

#### IV.

#### THE WRIT OF MANDAMUS IS NOT NECESSARY IN THIS INSTANCE FOR THE APPELLATE JURISDICTION OF THIS COURT.

The jurisdiction of this court is appellate only and it can issue extraordinary writs only when necessary for the exercise of its appellate jurisdiction. The courts have recognized that if the action of the lower court is such as to prevent the case from ever reaching this court on appeal, such action may be prevented by writs of mandamus or prohibition, but before this court can issue such writs it must clearly appear that its appellate jurisdiction is so threatened. Thus, in the case of *In Re Garrosi*, 229 Fed. 363, the writ was denied where the court held that the proceeding in the district court was advancing in due course and would ultimately ripen into a judgment from which an appeal would lie to the Circuit Court of Appeals. *Muir v. Chatfield*, 255 Fed. 24.

The cases along this line were reviewed by this court in its decision in *Hammond Lumber Co. v. United States District Court*, 240 Fed. 924.

It is evident that the order of July 9, 1923, made by respondent herein will not defeat the ultimate appeal to this court. The order of the respondent complained of herein is to the effect that respondent

would not pass upon the motion to dismiss until the conditions required by the order of the three judges had been fulfilled. As stated above, it has been at all times within the power of the petitioner herein to comply with such decision of the three judges or appeal therefrom to the Supreme Court of the United States. In other words, the order of the respondent simply stays proceedings until the same have been expedited by the petitioner herein. The petitioner having failed to take steps to expedite the hearing of the case on the merits, is in no position to allege that the jurisdiction of this court is being threatened by the stay of proceedings in the district court. It must be presumed that whenever petitioner can show to the district court that it has complied with the decision of the three judges, or that it has obtained a reversal of the decision of the three judges by the Supreme Court of the United States, then the district court will proceed with the suit pending before it, and until such showing has been made to the district court this court is without authority to issue a writ of mandamus for the reason that the same is not necessary to the exercise of its appellate jurisdiction.

## V.

THE WRIT, IF ISSUED, WILL NOT AFFORD RELIEF TO  
PETITIONER.

Where the writ of mandamus would be unavailing to aid the party seeking such relief, it will not be granted. *United States v. Norfolk, etc., R. R. Co.*, 118 Fed. 554; *In Re Welch Mfg. Co.*, 201 Fed. 519.

If the writ applied for should be granted, the respondent would be required to pass upon defendant's motion to dismiss. As this court could not direct the manner in which respondent should dispose of that motion, a showing made before the respondent might justify, in his judicial discretion, the granting of the motion, in which case, petitioner's bill would be dismissed. From this final order it is true an appeal would lie to this court, but the relief available to the petitioner on such appeal would be no greater than can now be obtained by petitioner on an appeal from the order of the three judges direct to the Supreme Court of the United States. On the other hand, if respondent should see fit to deny the motion to dismiss and require the defendants to answer, it is evident that so long as the decision of the three judges stands, respondent would still, if he has jurisdiction, be entitled in the exercise of judicial discretion to stay proceedings until the state remedies had been exhausted or the decision of the three judges reversed by the Supreme Court of the United States. It would be an idle and useless matter for the District Court



to proceed further with this case when the result of such proceeding might at any time be rendered unavailing by the decision of the Supreme Court of the United States, and it is therefore submitted that any relief afforded by the writ of mandamus would be of such uncertain and temporary nature as not to justify the issuance of that extraordinary writ.

Counsel for petitioner in support of their right to writ of mandamus, have cited the case of *McClellan v. Carland*, 217 U. S. 268, 54 L. Ed. 762, and other cases. These cases are all, we believe, easily distinguishable from the facts involved in the case at bar. Those cases involve ordinary concurrent jurisdiction of the state and Federal courts, and do not involve proceedings under section 266 of the judicial code wherein the constitutionality of a state statute or order of an administrative board under such state statutes is essential to Federal jurisdiction. Proceedings under section 266 are of so important a nature that the Federal courts have included them under the rule of "comity and convenience" asserted in the case of *Prentiss v. Atlantic Coast Line*, 211 U. S. 210. The respect accorded proceedings in the state courts in such cases is well set forth in the case of *Boston & M. RR. v. Niles*, 218 Fed. 944, 946.

"While this reasoning applies to litigation in a broad sense and to general rights, it has especial force in cases which involve the validity of a state statute which has not been passed upon by the state courts, and where the Federal courts are invoked to pass in the first instance upon the



question whether it is in conflict with the spirit of either the Federal or a state Constitution. In respect to such situations, the Supreme Court has set forth over and over again that, except in extreme and exceptional cases, the state court is the appropriate court to have the first opportunity to determine whether its statutes are good or bad in a constitutional sense. And, moreover, where state statutes relate to general rights, unless they conflict with the provisions of the Federal Constitution, it has been repeatedly said that the state court's interpretation or construction will generally be accepted as final, and would only be departed from, if at all, with reluctance."

This importance was fully recognized by the decision of the three judges, and will no doubt be equally observed by this court, and it is therefore incumbent with special force upon the petitioner to come to this court with a clear showing of a right to the writ sought, and it is submitted that an examination of the petition herein filed will indicate that the petitioner has not shown any right to the writ sought.

A considerable portion of petitioner's brief is devoted to an effort to show that the rule laid down in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, is not applicable to their suit in the district court. Unfortunately for petitioner, this argument failed to convince the three judges or the district court. We submit that while it would be a pertinent argument in support of petitioner's appeal to the Supreme Court of the United States, it is out of place in this argument relative to the issuance of a writ of mandamus. The three judges have passed

upon that question and determined adversely to petitioner. This court cannot now review the action of the three judges, and their decision on this question is the law of the case unless reversed by the Supreme Court of the United States.

In support of this contention, counsel place great reliance on the recent decisions of the Supreme Court of the United States in the cases of *Oklahoma Natural Gas Co. v. Russell*, *United States Advance Opinions*, 1922-23, page 395, and *Prendergast v. New York Telephone Co.*, 43 Supreme Court, 466. These cases are easily distinguishable from petitioner's case in the district court. In the *Oklahoma* case the *Oklahoma Natural Gas Co.* had applied to the Corporation Commission of Oklahoma for higher rates. The application was denied. The Oklahoma statute, which is admitted to be similar to the Virginia statute covered by the *Prentis* case, permitted an appeal from the commission to the Supreme Court. The gas company took such appeal and applied for a supersedeas. A supersedeas was denied, and while the appeal was pending before the state supreme court, the gas company applied to the Federal court for relief. It will be noted that it had first sought a stay of the order in the state courts and been denied. Its position is, therefore, the same as the position of petitioner would be if it were to comply with the requirements of the three judge decision, seek a stay in the state courts and be denied and then renew its application in the district court for preliminary in-

junction. Until it has done this, it can claim no benefit from the Oklahoma case.

Petitioner's failure on any of the five grounds alleged above to show cause for issuing the writ is, we contend, fatal to their case, and we respectfully submit that petitioner has failed on all five counts.

(B) THE DISTRICT COURT AND THIS COURT HAVE NO  
JURISDICTION BY VIRTUE OF THE APPEAL TO THE  
SUPREME COURT OF THE UNITED STATES.

This portion of our brief will be devoted principally to a discussion of the legal effect of the matters pleaded, including the appeal taken to the Supreme Court of the United States. So far as we have been able to discover, petitioner in its pleadings and brief here has completely ignored the existence of this appeal. The appeal was taken July 16, 1923, and the petition for mandamus was filed and order to show cause issued herein on or about August 2d, 1923. The præcipe for record on appeal to the Supreme Court of the United States includes the record as made, which resulted in the order of April 30, 1923, denying interlocutory injunction, and the opinion of the three judges filed May 23, 1923, on application for interlocutory injunction, pursuant to the order of April 30, 1923, and both said order and opinion are made a part of the record on appeal. The assignment of errors on appeal indicates that appellant there (petitioner here) has taken to the Supreme Court of the United States the identical issues presented by this

application for mandamus. A comparison of the petition herein and the assignment of errors on appeal attached to our Return herein establishes this. The petition recites the entry of the order of the three judges on April 30, 1923, and the opinion filed pursuant thereto, and attaches a copy of both to the petition and makes them parts thereof. The petition further recites the entry by respondent here of an order on July 9, 1923, and a copy of said order is attached to and made a part of the petition herein. A portion of this order last mentioned is as follows:

“It is now ordered that said motion to require the defendants to answer be, and the same is hereby denied, and the court declines to pass upon defendants’ motion to dismiss, said rulings being based upon the reasons stated in the opinion filed herein on May 23, 1923.”

That the issues presented on the appeal to the Supreme Court of the United States, and those involved in this application for mandamus, are the same, is put beyond the shadow of a doubt, by the affirmative matters alleged in our return, the petition filed herein, and finally, by petitioner’s own brief on this application.

#### APPEAL SUSPENDS JURISDICTION OF LOWER COURT.

Since the taking of the appeal on July 16, 1923, the respondent herein has been without power in the premises. It is well settled law that as soon as an appeal is taken, the jurisdiction of the appellate court attaches, and that of the trial court ceases.



*Keyser v. Farr*, 105 U. S. 265; *Kendrick v. Roberts*, 214 Fed. 268. Moreover, this long-established rule is of particular application in this case, because of the appeal direct to the Supreme Court of the United States under the provisions of section 266, Judicial Code, which petitioner herein has already employed. Petitioner cannot, in this proceeding, and by the device of the application for mandamus, appeal from the order of the three judges of April 30, 1923, or in this proceeding accomplish what amounts to the same thing, i. e., compel respondent to reverse his order of July 9, 1923 (expressly based upon the ruling of the three judges), which respondent cannot now do, without overruling the decision of the court of which he was a member, and further, because he is now without jurisdiction of the cause. The case of *Jackson v. Cravens*, 238 Fed. 118, is directly in point, and we quote the facts and the law from the same as follows:

“This cause was submitted upon the motion of the appellees to dismiss the appeal. The order appealed from was an order of the District Court for the Southern District of Florida, denying an interlocutory injunction applied for by the plaintiffs. The bill was filed to restrain the supervising inspector of naval stores for the state of Florida from taking steps to enforce an alleged unconstitutional statute of that state. As provided by section 266 of the Judicial Code, the District Judge, upon presentation of the application for a temporary injunction, called to his assistance a Circuit Judge and another District Judge, before whom the application was



heard, and by whom it was denied. Thereupon the plaintiffs took an appeal from the order of the District Court, composed of the three judges, to this court. Section 266 provides that:

“‘An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.’

“The contention of the plaintiffs (appellants) is that this provision is permissive only, and does not provide an exclusive remedy for an appeal, but that resort may be had, at the election of the plaintiffs, to the remedy provided in section 129 of the Judicial Code by appeal to this court. The defendants (appellees) contend that the appellate remedy provided by section 266 is exclusive.

\* \* \* \* \*

“We think Congress thereby intended to fully cover the subject-matter of appeals from such orders, and that the remedy so provided was exclusive, not cumulative. The rule was laid down by the Supreme Court in the cases of *Brown v. United States*, 171 U. S. 631, 19 Sup. Ct. 56, 43 L. Ed. 312, and *Lauren Oil Co. v. Morrison*, 212 U. S. 291, 29 Sup. Ct. 394, 53 L. Ed. 517, that:

“‘Where a statute provides for an appeal or a writ of error to a specific court, it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court.’

“We think the practical objects to be accomplished are better subserved by the construction we have given the section. In matters where the constitutionality of a state statute is involved, the desiderata are a speedy final decision of the question and the maintenance of the statu quo, as far as may be, pending its decision. The former is the more important. The latter is pro-

vided for by section 266, through the means of a hearing of the application for an interlocutory injunction by an 'enlarged tribunal' different from the court of equity mentioned in section 129. The former is accomplished by providing for a direct appeal to the Supreme Court from the order granted on the hearing of the application for the interlocutory injunction. An appeal to an intermediate appellate court would serve to delay the final and authoritative decision of the question. The decision of the interlocutory appeal in a large majority of cases of this character is determinative of the question as to the constitutionality of the state statute, if rendered by a court of last resort. To expedite a final settlement of the constitutionality of the state statute, a direct appeal to the Supreme Court provides the quickest method. The Supreme Court has the authority to advance the hearing when justice demands it. The importance of a speedy final settlement of the question is not confined to the litigants before the court, and their interests are not alone concerned. The state and its citizens are also concerned, and this makes a speedy and authoritative settlement of the question of more importance even than the preservation of the status in the instant case. Giving to the litigants the election to delay such authoritative decision by an appeal to an intermediate court would defeat this purpose.

"Because of the views expressed, we are constrained to hold that the appeal provided by section 266, direct to the Supreme Court, is exclusive, and that the appeal to this court should be dismissed, at appellants' costs; and it is so ordered."

In the order of the three judges filed on April 30, 1923, dissolving the temporary restraining order and

denying the application for an interlocutory injunction, it was stated that an opinion would be filed later. From an examination of the opinion it will be clearly noted that the right of the plaintiff to a temporary injunction on the merits was not passed on, nor considered by the court, as the action was stayed as a matter of law prior to the time that the merits might be considered, because the legislative machinery of the state had not been exhausted. An appeal was taken from the order of the three judges directly to the Supreme Court of the United States and obviously the only issue that could be raised upon that appeal was an issue of law, namely, whether the action should be stayed prior to the time that the legislative machinery of the state was exhausted. It could not raise the question of whether the plaintiff was entitled to a temporary injunction on the merits because such question was not passed on by the three judges. In this case, this court is asked to compel the respondent, Honorable Edward E. Cushman, to rule on defendants' motion to dismiss, and if such motion is denied, to compel defendants to answer in the original action instituted in the district court. Before this court can grant the relief prayed for in this action it must pass on the question of law decided by the three judges as to whether this action should be stayed until the plaintiff in the original action had exhausted its remedies in the state courts. It is therefore obvious that the petitioner herein has taken two appeals, one to the Supreme Court of the United

States, and one to the circuit court of appeals, involving only one issue of law, namely, whether the action should be stayed until the legislative machinery of the state had been exhausted. A different situation would be presented if the three judges had considered the application for a temporary injunction on the merits. If the relief prayed for in this case were granted, a situation like this might arise. Assume that this court granted the relief prayed for in this action and the district court overruled defendants' motion to dismiss in the original action, compelled defendants to answer, and proceeded with the trial on the merits, and assume that in the appeal to the Supreme Court of the United States the decision of the three judges was affirmed to the effect that the action should be stayed until the legislative machinery of the state had been exhausted, then the trial of the district court on the merits would be for naught.

#### (C) ANSWER TO PETITIONER'S ARGUMENTS.

The remaining portion of this brief will be directed to answering arguments made in petitioner's brief.

It is first contended that respondent did not necessarily have to overrule the decision of the three judges in order to grant the motion of petitioners to make the members of the department of public works answer in the original action instituted in the district court. But we believe that the contrary is true. From an examination of the decision of the three



judges filed on May 23rd, it clearly appears that the application for an interlocutory injunction was not passed on by the three judges on the merits. In fact, this application was not in any manner considered on the merits by the three judges. It was held as a matter of law by the three judges that the action in the district court was prematurely instituted, for the reason that the plaintiffs in that action had not exhausted the legislative machinery of the state and that such action must be stayed in the district court until such state machinery had been exhausted. There is no showing that petitioners attempted in any manner to exhaust the legislative machinery of the state, and it is therefore obvious that the respondent could not grant petitioner's motion to compel the department of public works to answer in the action in the district court, or compel respondent to rule on the motion to dismiss without overruling the opinion of the three judges. The three judges stated in the opinion that the action in the district court should be stayed until petitioners had performed certain conditions precedent. These conditions were not performed and obviously respondent could not proceed with the case without overruling that decision.

It is next contended by the petitioner that it would be futile for it to ask for a stay because the state law, section 10429, Rem. Comp. Stat., expressly prohibits a stay in an action of this character. However this may be, the three judges held that they must apply to the state courts for a stay and if the stay was de-



nied by the Supreme Court of the state, then they might apply for an interlocutory injunction in the district court pending the final decision by the Supreme Court. It would have been a very easy matter for the petitioner to have complied with the decision of the three judges and asked for a stay, and then if such stay had been denied, they would have been entitled to invoke the jurisdiction of the Federal court under the decision of the three judges. The fact that the statute might prohibit a stay of this character does not relieve them of the duty to apply for such a stay. In the first instance, it is for the state courts to construe this statute, and in the second instance, it might properly be that the state Supreme Court would hold such statute unconstitutional, or for other reasons permit a stay. They must at least apply for a stay and if the Supreme Court of the state denied it under the statute just referred to, then federal jurisdiction might be invoked.

It is also maintained that a stay of the enforcement of the order would grant no relief to petitioner for the reason that the stay would but keep the confiscatory order in effect. It is submitted, however, that a stay of the order of the department of public works refusing to grant petitioners the raise in rates asked for in the tariff filed with the department of public works would not keep in effect the confiscatory order of the department of public works appealed from, but would put in effect the rates prescribed in the

tariff filed by the petitioner with the department of public works.

It is next contended that if the decision of the three judges is correct, and the courts of the state of Washington are vested with legislative power in appeals from the department of public works, that such a statute is unconstitutional in that legislative powers cannot be lawfully delegated to courts. It is submitted, however, that the power of courts to substitute their findings on valuation for the findings of the department of public works, section 10441, Rem. Comp. Stat., is quasi legislative in its nature, and that such a delegation is not unconstitutional. It is also submitted that the question of whether or not such a statute is unconstitutional as violating one of the provisions of the state constitution is solely a question for the state court to determine and that such a contention should be first raised in the courts of the state. In fact, the Supreme Court of this state has had occasion to pass on this statute, and has assumed that such statute is constitutional and has never declared it unconstitutional. *Everett v. Department of Public Works*, Vol. 25, Wash. Dec. 7, p. 357.

Petitioner's next contention, that the time for appeal has elapsed, has already been answered in this brief from the fact that section 10441, Rem. Comp. Stat., does not prescribe a statute of limitation within which an appeal must be taken to the superior court.

It is next contended by petitioner, in view of the following language found in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210 (232):

“If the appeals are dismissed as brought too late, the companies will be entitled to decrees,”

that they are entitled to invoke federal jurisdiction, because the time for their appeal has expired. We have already shown that the time for their appeal had not expired at the time the opinion was filed, nor has it yet expired. In any event, it was incumbent upon the petitioner to take an appeal to the state courts and to apply for a supersedeas, and the question of whether or not their appeal was timely or they were entitled to a supersedeas, was one for the state courts to determine, as evidenced by the following language in the *Prentis* case:

“It may be that when an appeal is taken to the supreme court of appeals, this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter which is for the state tribunals to decide, but simply note a possibility.”

It would also seem that this argument of petitioner is in direct conflict with the equitable maxim to the effect that

“Equity aids the vigilant and not those who slumber on their rights.”

It is submitted that the language in the *Prentis* case quoted *supra* certainly assumes that an appeal will have to be taken in any event, and then if such appeal is declared by the state court to be too late, a

decree might be had. In any event, this language is *obiter dictum*, and no reasoning to support it. However, in the later case of *Public Utilities Commission of the District of Columbia v. Potomac Electric Power Company*, U. S. Sup. Ct. Adv. Ops. 1922-23, p. 512, it appeared that the utility company took an appeal from the public utilities commission which had entered an order fixing the valuation of the company's property. The appeal section provided that the appeal should be taken within one hundred and twenty days. In considering the question of whether federal jurisdiction might be invoked if the appeal were taken too late, the court said:

"Some question has been made as to the validity of section 65, which forbids all recourse to courts to set aside, vacate, and amend the orders of the commission after one hundred and twenty days, and of section 69, which puts the burden upon the party adverse to the commission to show, by clear and satisfactory evidence, the inadequacy, unreasonableness, or unlawfulness of the order complained of. It is suggested that this deprives the public utility of its constitutional right to have the independent judgment of a court on the question of the confiscatory character of an order, and so brings the whole law within the inhibition of the case of *Ohio Valley Water Co. v. Ben Avon*, 253 U. S. 287, 64 L. ed. 908, 40 Sup. Ct. Rep. 527. It is enough to say that, even if sections 65 and 69 were invalid, the whole act would not fail, in view of section 92 already referred to. It will be time enough to consider the validity of those sections when it is sought to apply them to bar or limit an independent judicial proceeding raising the



question whether a rate or other requirement of the commission is confiscatory.”

It will thus be seen that the court squarely refused to pass on this question which is a conclusion that the *Prentis* case is not conclusive on this point.

It is also maintained by petitioner that there is no controversy between the petitioner and the department of public works that the company's property in the state of Washington was valued by the public service commission in 1914, and that such valuation has not been reviewed, and that in determining the valuation of petitioner's property in the order filed March 31, 1923, that the value of the company's property was arrived at by taking the valuation computed in 1914 and adding the net additions and betterments made to the property subsequent to that date, and that such a method of computing value is erroneous in that the correct method of computing value is by computing the value at the time when the inquiry is made regarding rates as established by the Supreme Court of the United States in the cases of *State ex rel. Southwestern Bell Telephone Company v. Public Service Commission of Missouri*, 43 Sup. Ct. Rep. 544, and *Bluefield Water Works & Improvement Co. v. Public Service Commission of West Virginia*, 43 Sup. Ct. Rep. 675.

It is then contended that an appeal by the petitioner to the state courts would be futile because the state court would refuse to compute the value of petition-



er's property in conformity with the method announced in the United States Supreme Court in the cases cited *supra*, and that they would, under the decision of the state supreme court in *State ex rel. Spokane Gas Co. v. Kuykendall*, 119 Wash. 107, compute the value of petitioner's property by taking the value arrived at in 1914 and adding additions and betterments thereto. It will be noted that the United States Supreme Court cases cited *supra* were decided subsequent to March 31, 1923, and subsequent to the *Spokane Gas Co.* case, *supra*, and this argument is based solely on the ground that the state court will proceed to ascertain the value of petitioner's property in a manner contrary to the method which the United States Supreme Court has declared is correct. Certainly this court should not presume that the state courts will fail to follow the decisions of the Supreme Court of the United States or that they will compute valuation by a method which the United States Supreme Court has stated is incorrect.

It is next contended that even if the state courts have power to substitute their findings for the department of public works in valuation matters, which might be considered legislative in its character, that the test to be applied is that the nature of the final act determines the nature of the previous inquiry, and that the final act in this proceeding is the fixing of rates which the state courts have no power to do, and that therefore, the state courts do not exercise legislative power. It is apparent from an examina-

tion of section 10441, Rem. Comp. Stat., that the state courts do have power to substitute their findings for the findings of the department of public works on valuation matters, which is undoubtedly at least quasi legislative in its character. It is also undisputed that in the process of rate-making, the question of valuation is one of the most vital elements to be considered in determining rates. In other words, the question of valuation is so commingled with the question of the amount of the rate that they practically amount to the same thing, as rates are either made higher or lower, as the valuation of the company's property increases or decreases.

While it is true that the supreme court of this state does not have power to actually fix the amount of rates, it has power to review an order of the department of public works and to remand the proceedings to the department of public works with instructions to enter an order in compliance with the opinion, which at least indirectly gives the supreme court the power to change rates prescribed by the department of public works. In the case of *Public Service Commission, et al. v. State ex rel. Great Northern Railway Co.*, 118 Wash. 629, the court said:

“The case is remanded to the superior court with directions to add to the judgment already made by it the idea that the whole matter is again referred to the commission in order that it may act in consonance with this opinion.”

We also quote the following excerpt from the *Prentis* case, *supra*:

“Whether their property was taken unconstitutionally depends upon the valuation of the property. The income to be derived from the proposed rate and the proportion between the two are pure matters of fact. When those are settled, the law is tolerably plain.”

This shows clearly that the real issue involved is the valuation of petitioner's property and the question of whether or not they are being deprived of their property in an unconstitutional manner, depends upon the valuation of their property, the determination of which is legislative in its character. This statement is also authority to the effect that fixing value and making rates are practically the same.

In support of the rule that the legislative process of the state must be exhausted before federal jurisdiction may be invoked, the case of *Oklahoma Operating Company v. Love*, 64 L. ed. 596, is cited. In that case it appears that an action was instituted in the circuit court for the purpose of enjoining the corporation commission of the state of Oklahoma from enforcing a certain order. It also appears that under the state law, no appeal was provided to the state courts from the decision of the corporation commission. If, however, the operating company refused to comply with the order, it might be cited into court for contempt and heavy fines and penalties imposed. On appeal to the Supreme Court of the United States, it was held that the injunction might properly be granted, the inference being that if the statutes allowed an appeal to the Supreme Court of the state, it must first be

taken before federal jurisdiction could be invoked.

It is next contended that where the utility is daily suffering confiscation, it is not necessary that the legislative process be complete before a resort is had to the federal courts, and the case of *Oklahoma Natural Gas Co. v. Russell*, U. S. Adv. Ops. 1922-23, p. 395, is cited to support this contention. It is submitted that the *Russell* case is exactly to the contrary for in that case it appeared that the petitioner had applied to the highest state tribunal for a stay and had been refused. Where such a situation exists, the court holds that where the company is suffering daily, they may invoke the jurisdiction of the federal court. In this case, no resort has been made to the state courts for a stay and the case there cited is therefore inapplicable and direct authority for the position that petitioner must seek a stay in the state courts before they are entitled to invoke federal jurisdiction. This is shown clearly by the following language in the *Russell* case:

“Coming to the principal question, if the plaintiffs respectively can make out their case, as must be assumed for present purposes, they are suffering daily from confiscation under the rate to which they are now limited. *They have done all the they can under the state law to get relief and cannot get it.*” (Italics ours.)

In the case at bar no effort whatever has ever been made to seek all or any relief in the state courts.

The case of *Prendergast v. New York Telephone Co.*, U. S. Adv. Ops. 1922-23, p. 516, is cited by peti-



tioner in support of its position. In that case it appears that the three judges allowed a temporary injunction without requiring the public service company to exhaust its remedy in the state courts. If, exercising their discretion, they had imposed this condition precedent, a different question would have arisen and would have been identical with the situation here. It also appears from that opinion under a decision of the New York state court, that the fixing of rates by the commission was the final legislative process and the courts had no legislative functions to perform as the courts of this state have in valuation matters by virtue of section 10441, Rem. Comp. Stat. nor is there any contention made to that effect.

It is next contended that inasmuch as the petitioner is a foreign corporation, it has a right to invoke the jurisdiction of the federal courts on the grounds of diversity of citizenship, or it has the right to invoke the jurisdiction of the state courts by virtue of the appeal section of the Washington statutes in taking appeals from orders of the department of public works, and that no court has power to deny them this right of election, which it is claimed was done by the district court in this case. This contention is no doubt true in so far as private litigants are concerned, but it has no application where a state, by virtue of its sovereign power, creates a commission for the purpose of regulating public utilities and provides an appeal from a decision of such com-



mission to the state courts. The case of *Oklahoma Natural Gas Co. v. Russell*, *supra*, is exactly in point on this question and holds squarely that where a state has created a commission and provided an appeal to the state courts, that an appeal must be taken and a stay asked for before federal jurisdiction may be invoked.

It is also contended in support of the contention that mandamus will lie in this case, that the district court has absolutely stayed the present proceeding and that it will therefore render it impossible for petitioner to ever proceed to the circuit court of appeals by appeal because of this fact, and that therefore the circuit court of appeals has the right by mandamus to compel the district court to act in order to aid its appellate jurisdiction. It is submitted, however, that the district court has not absolutely stayed the present action, but has stayed it temporarily until certain conditions precedent have been performed by petitioner, namely, to exhaust the state remedy, which is not an unreasonable condition. All that petitioner must do would be to take an appeal to the state courts and apply for a supersedeas, and if the supersedeas were denied under the decision of the three judges, it might then invoke federal jurisdiction.

As stated in the case of *American Construction Co. v. Jacksonville Railway Co.*, 148 U. S. 372 (379):

“Least of all, can a writ of mandamus be granted to review a ruling or interlocutory or-

der made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination'; would 'introduce the supervising power of this court into a cause while pending in an inferior court, and prematurely to decide it'; would allow an appeal or writ of error upon the same question to be 'repeated, to the great oppression of the parties'; and 'would subvert our whole system of jurisprudence.' "

Again, in the case of *McClellan v. Carland*, 217 U. S. 268 (281) it was said:

"It cannot be denied that a circuit court of the United States, like other courts, had power to postpone the trial of cases for good reasons, but by the order made in this case, the federal court withheld the further exercise of its authority until the state court, by its action in a case involving all the parties, might render a judgment which would be *res adjudicata* and thus prevent further proceedings in the federal court."

In the instant case the action has not been absolutely stayed but only postponed for good reasons, namely, until the legislative machinery of the state has been exhausted or until a stay has been applied for and denied.

A great many cases are cited by petitioner to the effect that where both the federal and state courts have concurrent jurisdiction, an action should not be stayed in the federal court until the issues were determined in the state court, as the decision of the

state court would be *res adjudicata*, and the appellate jurisdiction of the circuit court of appeals would thus be defeated, and that, for this reason, the circuit court of appeals might properly issue a writ of mandamus to compel the district court to proceed in aid of its appellate jurisdiction. It is submitted, however, that while this rule may be true in case of private litigants where both the state and federal courts have concurrent jurisdiction, that it has no application to the present case where the state has created a commission for the purpose of regulating public utilities and has provided an appeal to the state courts. In the case of *Boston & M. R. R. Co. v. Niles*, 218 Fed. 944 (948), the court said:

“We make no suggestion as to the proper remedy in case of a result adverse to the railroad before the state court or upon this phase of the case, further than to say that the petitioner would be at liberty to renew his application in the federal courts without fear of being met by a plea of *res judicata*.”

The decision of a state court on whether or not a rate was confiscatory in violation of the fourteenth amendment to the United States Constitution would not be *res adjudicata* on the federal courts, in any event. The line of cases cited by petitioner are not in point, as in the present case the federal and state courts do not have concurrent jurisdiction, because in the *Oklahoma Natural Gas Co. v. Russell*, *supra*, the supreme court of the United States stated that

the federal courts do not have jurisdiction until a stay is asked for in the highest state tribunal.

Respectfully submitted,

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No. 4070

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

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THE PACIFIC TELEPHONE AND TELEGRAPH COM-  
PANY (a corporation),

*Petitioner,*

VS.

HONORABLE EDWARD E. CUSHMAN, United States  
District Judge for the Western District of  
Washington, Southern Division.

**REPLY BRIEF OF PETITIONER**

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FILED

SEP 17 1923

R. H. [illegible]



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**REPLY BRIEF OF PETITIONER**

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**Argument**

The fallacy in the argument of counsel for respondent is in the assumption that by this proceeding in mandamus we are seeking to review the *action* of the three-judge court in refusing to issue an interlocutory injunction. This court is urged to deny relief upon the theory that the opinion of the three judges is controlling. The argument rests upon a wholly false premise.

It is true that the respondent district judge based his refusal to hear and determine the motion to dis-

miss and to proceed to trial upon the merits in due course upon the reasoning of the three-judge court. But our right to invoke the aid of this court is governed by the *acts* of the district court, rather than by the reasons for those acts—by the *order* made by the district court, not by the opinion of the judge.

It is very clear that the reasoning of the three-judge court is not binding upon the district court or upon this court. Were it not for the provisions of section 266 of the Judicial Code the power to issue an interlocutory injunction would reside in the district court. That statute provides for the convening of three judges for the especial purpose of considering the application for relief *pendente lite*. As said by the Supreme Court of the United States in *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Comm.*, U. S. Adv. Op. 1922-23, pp. 96, 98:

“The wording of the section leaves no doubt that Congress was by provisions *ex industria* seeking to make interference by *interlocutory injunction* (italics ours) from a federal court with the enforcement of state legislation regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict

between federal and state authority always to be deprecated."

With the disposition of the application for an interlocutory injunction the function of the three-judge court ended. The only questions involved upon the appeal to the Supreme Court of the United States are those arising in respect to the order denying the injunction. All further proceedings arising in the prosecution and trial of the suit upon the merits are within the exclusive jurisdiction of the district court, subject to the control of this court and of the supreme court in the exercise of their respective appellate jurisdictions.

Section 266 does not create a new tribunal. Applications under that section are addressed to the district court, and all orders are then made by that court (*Jackson v. Cravens*, 238 Fed. 117, 120). The district court, composed of one judge, has *sole* jurisdiction of the *whole* action except that in passing upon the application for a temporary injunction he is required to "call to his assistance to hear and determine the application two other judges." The three judges sit as an enlarged district court for that single purpose. They have no appellate jurisdiction nor any other jurisdiction than merely to pass upon the application for an



interlocutory injunction. When that application has been heard and an order entered granting or denying the interlocutory injunction, the three-judge court has concluded its single function. The cause thereafter continues in the same district court as a one-judge court; and while the order issued by the three-judge court on the application for the preliminary injunction may go on appeal to the supreme court, the cause, for the purpose of taking evidence and determining on the merits whether a final and permanent injunction should be granted, irrespective of the disposition of the application for the temporary injunction, remains within the sole and exclusive jurisdiction of the one-judge district court. The cause, from the date of filing suit until the entry of final judgment, is at all times in the district court. Section 266 is merely a limitation on the power of a single district judge. Except as so limited his powers with reference to the cause are unrestricted.

*Ex parte Metropolitan Water Co.*, 220 U. S. 539.

*Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com.*, U. S. Adv. Op. 1922-23, 96.

The fact that Judge Cushman based his refusal to proceed in due course upon the reasoning in the

opinion of the three judges is wholly immaterial. If the opinion is sound, Judge Cushman is right in refusing to proceed. But if the opinion is unsound, the cause should proceed to trial in the district court, irrespective of the erroneous conclusion of the three-judge court in passing upon the application for an interlocutory injunction, or the steps we have taken to correct that error. It is true that we attack the reasoning of the three-judge court. But we attack that reasoning because it is the basis of Judge Cushman's order denying our application to require that the case proceed on the merits—not in an attempt to procure an interlocutory injunction.

Respondent's whole argument is premised upon the view that the opinion of the three-judge court is binding upon the district court. Obviously, since the three-judge court convened for a special purpose, has no jurisdiction in respect to the suit on the merits, the opinion has no binding force.

The foregoing, we think, is a complete answer to the argument of counsel for respondent. The case, however, is an important one and we shall therefore examine in detail the specific points made in counsel's argument and the authorities cited.

THE RESPONDENT HAS REFUSED TO PERFORM A  
JUDICIAL ACT INCUMBENT UPON HIM—  
THE TRIAL OF THE CASE ON THE  
MERITS IN DUE COURSE

Suppose the three-judge court had based its denial of the interlocutory injunction upon the ground that the confiscation of the petitioner's property had not been clearly shown. Obviously, under such circumstances it would be the duty of the district court to hear the case on the merits and render its decision upon the pleadings and the evidence introduced. Counsel contend, however, that the opinion of the three-judge court denying the injunction upon the ground of "comity and convenience" because the petitioner has not exhausted its state remedies precludes further action by the district court until the petitioner shall have complied with the requirements set forth in the opinion. Counsel say ( p. 11 ) :

"The three judges determined that upon the broad ground of comity and convenience the federal courts will not entertain an application for relief until state remedies have been exhausted. *We believe that this conclusion is binding upon the district court.*"

As we have pointed out, it is the acts of the three-judge court—not its opinions—that are binding upon the district court. This is illustrated by the case of *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, U. S. Adv. Op. 1922-23, p. 96, cited in respondent's brief. It was there held that where the three-judge court had declined to issue an interlocutory injunction, the district court could not in effect perform that act by granting a stay pending an appeal. The power of the district court to proceed with the cause on the merits was not involved. This decision holds that the district judge cannot do an *act* inconsistent with the *act* of the three-judge court. He cannot grant an injunction after the three-judge court has denied one, and he cannot dissolve an injunction after the three-judge court has granted one. But the decision does not prevent the district judge from doing an act that is consistent with the act, although perhaps contrary to the reasoning, of the three-judge court. Proceeding with the cause on the merits and taking testimony to determine whether a final and permanent injunction should be entered is the next step after the denial of the interlocutory injunction, and perfectly consistent with it.



Nor is the case of *Jacksonville Gas. Co. v. City of Jacksonville* 286 Fed. 404, cited by respondent, in point here. The only question involved in that case was the right to an appeal from the three-judge court to the Circuit Court of Appeals, which it was held would not lie in view of the specific provision of §266 of the Judicial Code, giving the right of appeal to the Supreme Court of the United States.

The case of *Boston & Maine R. R. Co., v. Niles*, 218 Fed. 944, also cited by respondent, is manifestly unsound. The case was decided before the decision of the United States Supreme Court in *Detroit etc. Co. v. Commission*, 235 U. S. 402, 59 L. ed. 288, and the court misapplied the reasoning of the *Prentis* case. The decision is clearly contrary to the later decision of the Supreme Court of the United States in the *Detroit* case. It has never been followed or cited.

The principle that courts will not attempt by mandamus to require a lower court to do what is not within its jurisdiction to do, or attempt to control the jurisdiction of the lower court, is not applicable to the present case. Here, the interlocutory injunction having been denied, it became



the duty of the district court to hear the case on the merits, unless valid reasons for staying the action existed. Whether or not such reasons did exist is the subject of the inquiry in this case. And this inquiry is not answered by reference to the reasoning of the three-judge court, which, as we have shown, is not binding upon the district court.

Indeed, no question of the jurisdiction of the federal district court is involved. The suit is within the jurisdiction of that court and it is its duty to exercise it when properly called upon. (*Prendergast v. New York Telephone Co.*, U. S. Adv. Op. 1922-23, p. 516.) The only question is whether it is the duty of the court to exercise its jurisdiction in the present case and to proceed to the trial on the merits. And the final order of the Department of Public Works having been made, that question depends upon whether relief may be obtained from some *legislative action* of the state courts. In other words, before the district court is warranted in staying a suit within its jurisdiction upon grounds of "comity and convenience," *i.e.*, so that the company may exhaust the legislative remedies afforded by the state law, it must be able to point to some form of relief available under that law; and unless relief may be had from some

legislative action of the state courts, it is the duty of the district court to proceed with the cause in due course. It cannot suspend action by requiring the suitor to apply to the state authorities for relief without first determining that relief may be obtained from that source. It cannot abdicate its jurisdiction upon the mere surmise that relief is obtainable from a state court. It must find affirmatively that such relief may be had.

The three-judge court assumed that relief was obtainable in the state courts, and denied an interlocutory injunction. The district court, upon the same reasoning, likewise assumed that such relief might be obtained, and refused to proceed with the suit until the company had first applied to the state courts. Now counsel ask this court to make the same assumption and to deny us relief until we have applied to the state courts. We have clearly shown that there is no remedy in the state courts; at least no remedy that is legislative in its nature. And we submit that it is no answer to tell us that we have not applied for relief.

Either the state courts have legislative power or they have not. We may either obtain relief from some legislative act of those courts or we may not. But if it is clearly demonstrated that no such re-

lief is available, then it is the duty of the district court to exercise its jurisdiction of the suit without requiring us to do the futile act of applying to the state courts for relief they have no power to grant; especially where there is danger of the submission to the judicial power of the state courts and the consequent ousting of the federal jurisdiction. (*Detroit, etc. Co. v. Commission*, 235 U. S. 402, 59 L. ed. 288.)

#### THE PETITIONER HAS NO OTHER REMEDY

We do not question the rule that mandamus will not be issued where there is other appropriate relief. That rule is elementary. We contend, however, that it is the duty of the district court to proceed with the case on the merits. If this contention is sound, mandamus is our only remedy. The order of the district court refusing to proceed is not a final order from which an appeal will lie. In order to give this court appellate jurisdiction, the judgment or decree "must terminate the litigation on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but execute its judgment or decree it had already rendered. *Georgia Railway & Power Co. v. Decatur*, U. S. Adv. Op. 1922-23, p. 670-72.

It is suggested, however, that we have failed to comply with the requirement of the opinion of the three-judge court that we seek relief in the state courts as a condition to further action of the federal court. As above stated and pointed out in our opening brief, we cannot seek this stay without danger of foreclosing our right to relief in the federal courts.

It is suggested that although the time for appeal from the decision of the Department of Public Works has expired, the state courts may, nevertheless, entertain an appeal, and that we do not know that they will not until we have tried. Just what authority the state courts would possess to perform this act of grace is not pointed out. The suggestion, however, is completely answered by the language of the Supreme Court of the United States in *Prendergast v. New York Telephone Co.*, U. S. Adv. Op. 1922-23, p. 516, where it was contended that "comity and convenience" required an application for rehearing to the public service commission before resort to the state courts. The court there said (p. 518):

"It was not necessary that the company should apply to the commission for a rehearing before resorting to the court. While, under the Public Service Commission Law, any person interested in



an order of the commission has the right to apply for a rehearing, the commission is not required to grant such rehearing unless, in its judgment, sufficient reason therefor appear; the application for the rehearing does not excuse compliance with the order or its enforcement except as the commission may direct; and any change made in the original order upon the rehearing does not affect the enforcement of any right arising from the original order (§22). As the law does not require an application for rehearing to be made, and its granting is entirely within the discretion of the commission, we see no reason for requiring it to be made as a condition precedent to the bringing of a suit to enjoin the enforcement of the order.” (*Italics ours.*)

#### THE WRIT OF MANDAMUS IS NOT HERE USED AS A SUBSTITUTE FOR AN APPEAL OR WRIT OF ERROR

We concede, of course, that the writ of mandamus cannot be used as a substitute for an appeal or writ of error. The answer to this division of respondent’s brief is that we have no appeal from the order of the district court refusing to hear our motion to dismiss or require the respondents to answer. That order is not a final order from which an appeal would lie.



## THE WRIT OF MANDAMUS IS NECESSARY FOR THE APPELLATE JURISDICTION OF THIS COURT

Respondent's argument on this point is fully answered on page 28 of the petitioner's opening brief. The Circuit Court of Appeals has an undoubted right to hear this cause on appeal from the *final* judgment on the merits either granting or denying a permanent injunction. Judge Cushman's refusal to proceed with the trial on the merits, which we have shown it is his duty to do, is an interference with the appellate jurisdiction of this court, and therefore, this court can issue its mandate in aid of its appellate jurisdiction.

## THE WRIT IS NECESSARY FOR PETITIONER'S RELIEF

This mandamus is not sought to compel respondent to deny defendants' motion to dismiss; but to hear and decide that motion and to proceed with the cause. The mere fact that if the respondent district judge is ordered by this court to proceed with the cause, he will be obliged to pass on the motion to dismiss is no answer to petitioner's right to have the cause proceed on the merits. The motion to dismiss is a step in the proceeding on the merits, and of course cannot be reached until the

respondent is ordered to proceed with the cause. Petitioner is willing to meet that motion when the time arrives.

In the next place, decision by the Supreme Court of the United States on the temporary injunction will not render it "an idle and useless matter for the district court to proceed further with the cause." If the supreme court reverses the action of the three judges in granting the injunction, then the cause below, if the trial judge is now required to proceed, will have approached so much nearer to final judgment, a stage which this case eventually must reach regardless of the disposition of the application for temporary injunction. If the Supreme Court of the United States affirms the action of the three-judge court, but for reasons other than those advanced by the three judges, then petitioner is still entitled to have its case tried on the merits, and again the petitioner will be so much nearer final relief if the district judge is now required to proceed. And finally, if the Supreme Court of the United States affirms the action of the three judges for the same reasons advanced by them, then any proceedings, now taken by the district judge on the merits of the cause are not useless, because the supreme court, even if it should

deem the *Prentis* case applicable, would do no more than require the trial court, which concededly has jurisdiction, to hold the cause in abeyance at whatever stage the trial on the merits had reached, pending resort to the alleged state legislative remedies, following which, if they prove inadequate, the cause on the merits will proceed from the point where stayed.

Under the constitution, petitioner is entitled to a final judgment on the merits in the federal court and to have that point reached as speedily as possible. If the relief in the state courts is legislative, then, of course, petitioner has a right to proceed in the federal court at the conclusion of the legislative stage. If the relief in the State courts is judicial, then petitioner has the right to continue in the federal court now. But in either event, whether the action of the state court be legislative or judicial, petitioner at some time has the right to proceed with the present cause in the federal court. The only question is whether that continuation shall be now or later. And it must be apparent in answer to that question, that the further the cause is advanced in the federal court now, the better, so far as petitioner's ultimate and expeditious relief is concerned.

On page 27 of their brief, counsel say:

“This court cannot now review the *action* of the three judges, and their *decision* on this question is the law of the case unless reversed by the Supreme Court of the United States.” (Italics ours.)

It is hardly necessary to repeat that petitioner is not trying in this court to review the *action* of the three judges in denying the interlocutory injunction. That matter has been appealed to the Supreme Court of the United States. Nor is the decision of the three judges “the law of the case” on the merits. The decision of the three judges is only the law of the case in so far as the denial of the interlocutory injunction is concerned, a matter entirely different and apart from the cause on the merits.

AN APPEAL FROM AN INTERLOCUTORY ORDER  
DOES NOT DEPRIVE TRIAL COURT OF JURIS-  
DICTION TO TRY THE CASE ON  
ITS MERITS.

It is contended that we are not entitled to the relief asked for in this proceeding, because an appeal has been taken to the United States Supreme Court from the three-judge order of April 30th, denying an interlocutory injunction, and that thereby the trial court has lost jurisdiction.



No good reason can be assigned why a trial court should lose jurisdiction when an appeal has been taken, *not* from a *final* decree but from an interlocutory order. Not only so, but we assert that no authority can be found holding that in the absence of a statute so declaring, a trial court does lose jurisdiction over the merits of the cause when an appeal has been taken from an interlocutory order.

In Elliott on Appellate Procedure, § 542, the rule is laid down as follows:

“Where the law permits an appeal from an interlocutory judgment or an intermediate order, and the appeal is from such an order or judgment, only part of the case is removed by appeal from the trial court to the appellate tribunal. But the part of the case appealed goes completely to the higher court. If, for instance, an appeal is duly taken from an order appointing a receiver, only so much of the case as affects that order is carried out of the jurisdiction of the trial court, and, *as it retains jurisdiction of the principal issues, it may proceed to hear and determine them*, but it certainly could not hear or decide the branch of the case removed by the appeal to the higher court. If, to again illustrate, suit should be brought to foreclose a mortgage and for the appointment of a receiver, and the court should enter an interlocutory order appointing a receiver, a proper appeal would carry up the case so far as it involved the order, but it would leave the part of the case involved in the issue made upon



the mortgage in the trial court. It is quite clear, upon principle and authority, that what is effectively appealed leaves the jurisdiction of the one court and completely enters that of the other."

In *Guynn v. Newman*, 174 Ind. 161, 90 N. E. 759, it is said:

"After an interlocutory order appointing a receiver has been made, and such interlocutory order appealed from, the cause, notwithstanding the appeal, remains pending in the trial court, and amendments and changes in the pleadings may be made as in other cases."

See, also,

*First National Bank v. Dutcher*, 128 Ia. 413,  
104 N. W. 497.

*State ex rel. Sanglin v. Superior Court*, 30  
Wash. 232.

*State ex rel. Anderson v. Superior Court*, 36  
Wash. 196.

*Gorham v. Farson*, 18 Ill. App. 520, 526.

*Barton v. Long*, 45 N. J. Eq. 161.

*Ex parte Collins*, 151 Fed. 358.

*Wapello State Savings Bank v. Colton*, 143  
Iowa 359, 122 N. W. 149, 153.

*Murphy v. Police Jury of St. Mary's Parish*,  
117 La. 355, 41 So. 647.

*Barnum v. Barnum*, 42 Md. 251, 294.

*Doolittle v. American Nat. Bank of Omaha*,  
58 Neb. 454, 78 N. W. 926.

The cases cited by counsel for respondent in support of their contention, are clearly not in point. In *Keyser v. Farr*, 105 U. S. 265, an appeal from a *final* decree was taken, while in *Kendrick v. Roberts*, 214 Fed. 268, a writ of error to a *final* judgment was sued out. In such a case, jurisdiction of the trial court ceases. But we have not taken an appeal from a final decree, but only from an interlocutory order.

Nor is the case of *Jackson v. Cravens*, 238 Fed. 118, in point. The facts in that case were that an application for an interlocutory injunction was made to the three-judge court. The application was denied. The complainant then took an appeal to the United States Supreme Court from the order denying the interlocutory injunction, and another appeal from the same order to the Circuit Court of Appeals. These two appeals sought precisely the same relief.

In the case at bar, the appeal to the United States Supreme Court and this proceeding are not even in effect appeals from the same order, nor are the appeal and this proceeding designed to secure the same or even substantially the same relief.

Again we say that by the appeal we seek to secure, in due time, an injunction effective until final

decree. By this proceeding we seek to compel the district judge to act, which action in due time will cause and lead to the entry of a final decree establishing the rights of the parties to the suit commenced on April 24th.

In *Jackson v. Cravens*, 238 Fed. 118, the sole purpose of the two appeals was to obtain relief *pendente lite*. That was also the sole purpose in the case of *Cumberland Tel. & Tel. Co. v. Louisiana Public Service Com.*, 43 Sup. Ct. Rep. 75, and *Jacksonville Gas Co. v. City of Jacksonville*, 268 Fed. 404. But by this proceeding we seek no relief *pendente lite*. All we ask is that the trial judge should take such action as will result in due time in a final decree.

#### NO STAY POSSIBLE IN STATE COURT.

If we understand aright the position of counsel for respondent, it is that we should have applied, in the case brought by the City of Seattle in the Thurston County court, for a stay, and that we should have brought an independent proceeding to review the valuation finding of the department and in that proceeding also apply for a stay.

Why two applications should be made is not readily perceived. Moreover, we think it plain that

if we brought a proceeding to review the valuation finding in the state court the proceeding would have to be confined to a consideration of that finding and not to a consideration of the order of March 31, 1923.

But how can a finding be stayed? Obviously the stay to be applied for is a stay of the enforcement of the *order* of March 31st. It is the enforcement of that order which confiscates the company's property, not the making of the valuation finding.

Now there are two, and only two, possible sources from which the state court can derive the power to grant a stay of the enforcement of the order, one given by statute, one existing by virtue of its inherent judicial power.

But the statute, section 10429 Rem. Com. Stat., expressly provides that the state court can *not* grant a stay. It is not denied by counsel for respondent that the statute so provides, but it is suggested by them that "it is for the state courts to construe the statute," and that the state supreme court may hold such statute unconstitutional "or for other reasons permit a stay." (Resp. brief, p. 36.)

But the brief of respondent is barren of even a hint that the statute can be construed in any way



other than denying to the state court the power to grant a stay. The reason for this is perfectly clear. The statute is plain and unambiguous—“*no supersedeas shall be allowed in any case from such order pending the final determination of the cause in the superior court, or if appealed to the supreme court, by such supreme court.*”

Is the statute unconstitutional? There is no argument in the brief of respondent that it is unconstitutional. No reason is assigned as to why it should be held unconstitutional. We can conceive of no reason why the statute should be held invalid. Moreover, how can the question as to whether the statute is valid or not arise? We believe, and have so asserted, that the statute absolutely deprives the state court of the power to grant a stay, and that the statute is valid. On what theory then can we ask the state court for a stay? Are we to go into a court of justice and with a lie on our lips ask the court to grant to us a relief which we believe the court has not the power to give?

The situation presented is certainly a curious one to say the least. We have brought a suit in the federal court, as we had a right to do. As a condition of securing a trial in that court, we are told that we must apply to another court for a relief



which that court is forbidden to grant, but which our adversary, without giving any reasons therefor, suggests may be granted to us if we contend for that which we believe to be untrue, namely, that the statute is unconstitutional.

And may we not ask what counsel for respondent would do if we followed the course suggested by them? Would they say to the state court that the statute is unconstitutional?

It is also argued that the state court "for other reasons might permit a stay."

*What other reasons?*

The only possible "other reason" is that the state court might grant a stay in the exercise of its inherent judicial power. We doubt the existence of the power in this case, but we need not argue that proposition for it is immaterial whether the power exists or not. If it does not exist, there is an end to the argument. If the power does exist, the only court which can exercise it is a court acting in a judicial capacity. But the state court in the independent proceeding which it is asserted we should bring to review the valuation finding, will act according to the theory of respondent in a *legislative* capacity. So acting, no stay could be granted in that proceeding. And here we may say that to

require us to bring an independent proceeding to review the valuation finding in the state court requires us to do an absolutely absurd thing. We assert that the statute which provides that the state court can act in a legislative capacity in reviewing a valuation finding, is unconstitutional. But if we institute a proceeding to review the valuation finding, we must institute it by virtue of the provisions of the very section of the statute which we believe to be unconstitutional. But just how can one comply with the provisions of a statute, seek relief under the statute and at the same time assert that the statute is wholly void?

In the case already brought by the city of Seattle in the Thurston County court, the court is reviewing the rate order of March 31, 1923. It cannot review in that case the valuation finding, as the city of Seattle is not permitted to seek a review of a valuation finding.

*Everett v. Department of Public Works*, 25 Wash. Dec. 357.

The court in that case must then act in a purely judicial capacity. Now, if we apply in that case to a court acting in a purely judicial capacity to grant a stay, surely we have invoked the judicial power of the state court. But if we invoke the

power of the state court will not its final judgment be binding upon us? Can we take the position that we are in that case for one purpose and out of it for all other purposes? On this phase of the case the decision in the case of *Detroit & Mackinac R. Co. v. Michigan Railroad Comm.*, 235 U. S. 402, is squarely in point. There the regulatory body made an order fixing rates. The utility, as it is argued we should do, sought relief in the state courts. Relief was there denied. The utility applied to the United States Supreme Court for the allowance of an appeal or writ of error. *Its application was denied.* It then brought suit in the United States District Court and applied for an interlocutory injunction. The three-judge court held that the utility was concluded by the judgment of the Michigan state court and the United States Supreme Court affirmed the three-judge decree.

### THE IMPOSITION OF LEGISLATIVE FUNCTIONS UPON STATE COURTS

Practically no attempt is made to answer our contention that section 10441, Rem. Comp. Stat., is unconstitutional in that it purports to impose upon the state courts of Washington a legislative duty or function.

It is, however, said that the Supreme Court of the State of Washington *assumed*, in the case of *Everett v. Department of Public Works*, vol. 25, Wash. Dec. p. 357, that the statute was valid. But it will not be pretended that *any* question as to the constitutionality of that section arose or was discussed in that case.

The only questions involved in that case were, first, whether the city of Everett had instituted review proceedings in the court of the proper county, and, second, whether the city of Everett could review a valuation finding of the Department of Public Works.

Moreover, it is familiar law that a court will not examine into the validity of a statute unless necessary so to do. Nor does the fact that a court has been called upon to construe a statute amount to even an assumption that the court deems the statute constitutional.

*Ireland v. Palestine etc. Turnpike Co.*, 19 Ohio St. 367, 373.

*Kansas City M. & B. R. Co. v. Whitehead*, 109 Atl. 495, 19 So. 705, 707.

*State ex rel. Wine v. Keokuk & W. R. Co.*, 99 Mo. 30, 12 S. W. 290, 293.

*Davison v. Chicago & N. W. Ry.*, 100 Neb. 462, 160 N. W. 877.



In addition to the cases cited on pages 14, 16, 17 and 18 of our opening brief, holding that legislative power can not, under the constitution of the State of Washington, be vested in the courts of that state, we call particular attention to the decision in the case of *Detroit & Mackinac Ry. v. Michigan R. R. Comm.*, 235 U. S. 402. It there appears that the Supreme Court of the State of Michigan had held "that the duty of the courts [of that state] is not essentially different from that of the Commission." Despite this statement, the United States Supreme Court held that legislative power could not constitutionally be given to Michigan state courts. The court said, "that in the absence of a *clear* decision by the supreme court, we should not believe that the legislature attempted to grant or could grant such powers to the courts of Michigan." (235 U. S. 405.)

Now, there certainly is no clear decision of the Supreme Court of the State of Washington holding that a legislative function can be imposed upon the state courts of Washington. On the contrary, there are decisions holding clearly and unmistakably that legislative power can not be vested in Washington state courts.

*Territory ex rel. Kelley v. Stewart*, 1 Wash.  
98, 110.



*Spokane v. Spokane & Inland Empire R. Co.*,  
75 Wash. 651, 659.

*State ex rel. Seattle v. Public Service Commission*, 76 Wash. 492, 500.

*In re Bruen*, 102 Wash. 472.

*State ex rel O. R. & N. Co. v. Commission*,  
52 Wash. 17, 26, 32.

*Selde v. Lincoln County*, 25 Wash. 198, 206.

*No court has ever held that the legislative function of determining value or fixing rates can be imposed upon the courts of a state unless the constitution of that state has so declared.*

THE DIFFERENCE OF OPINION BETWEEN THE DE-  
PARTMENT AND THE COMPANY AS TO VALUE,  
IS PURELY A JUDICIAL QUESTION

We said in our opening brief that the United States Supreme Court had decided *time and time again* that the value of the property of a public utility was to be determined as of the date when an inquiry regarding rates was made; that section 10441, Rem. Comp. Stat., as construed by the Supreme Court of the State of Washington in the case of *State ex rel. Spokane Gas Co. v. Kuykendall*, 119 Wash. 107, precluded such a method of determining value if the property had once been valued;

that this difference as to the rule for determining value was the sole difference as to value between the company and the Department of Public Works; and that, consequently, if the company went into the state courts of Washington the question before such courts would be purely a judicial question.

What answer is made to this proposition? It is said that the case of *State ex rel. Spokane Gas Co. v. Kuykendall*, was decided prior to the rendition of the opinions in the *Missouri Telephone Company* case, 43 Sup. Ct. Rep. 544, and the *Bluefield Water Works* case, 43 Sup. Ct. Rep. 675, and that the Washington Supreme Court would *now* follow these two decisions of the United States Supreme Court. But the two decisions of the United States Supreme Court just mentioned announced no new rule of law. They do but re-affirm that which was said in *Willcox v. Consolidated Gas Company*, *The Minnesota Rate Cases*, and several other cases decided by the United States Supreme Court both before and after the decision in the *Willcox* case. All these decisions were called to the attention of the Washington Supreme Court in the *Spokane Gas Company* case. Not only so, but the court quoted from the syllabus of the *Willcox* case the rule relative to value, and *then refused to follow it*. On what theory is it now

asserted that the court will reverse its former holding?

NATURE OF FINAL ACT DETERMINES NATURE OF  
PREVIOUS INQUIRY.

In the *Prentis* case, 211 U. S. 217, the court declared that the test by which it was to be determined whether a court was acting judicially or non-judicially was that "the nature of the final act determines the nature of the previous inquiry."

Now, the order which gives rise to this entire controversy is a rate order. It is that order which confiscates the company's property. If the state court on review of that order *cannot* change the rates established by the department, then the court under all authority will act in a judicial capacity.

The answer made to this proposition, if we understand counsel's argument aright, is that the state court can "at least indirectly change rates prescribed by the department," and that the court since it has such power must act in a legislative capacity. If this is not their position, what is meant by the statement just quoted and the further statement "that fixing value and making rates are practically the same?" But we have already shown that the

state courts of Washington cannot have imposed upon them any legislative powers or duties.

COMPANY ENTITLED TO RELIEF EVEN IF LEGISLATIVE PROCESS INCOMPLETE.

We have previously pointed out that where the utility is daily suffering confiscation, it may resort for relief to the United States courts even though the legislative process is not complete.

Counsel seek to turn the case of *Oklahoma Natural Gas Co. v. Russell*, U. S. Adv. Ops. 1922-1923, p. 395, against us by calling attention to the fact that in that case the utility did apply for relief in the state court before filing its bill in the United States court. That case, however, cannot be so distinguished. The Oklahoma statute *expressly* gave to the state courts *the power to grant a stay*. But the Washington statute expressly *denies* to the state court the power to grant a stay. The utility in the *Oklahoma* case had done all it could under the state law to get relief and could not get it, but so has the company in the case at bar.

In the *Oklahoma* case the state court had the power to grant a stay; hence, the utility had a clear legal right to apply therefor. In this case, the pow-



er to grant a stay has been expressly withheld from the state court; hence, the utility has no right to apply therefor.

### THE WRIT SHOULD ISSUE.

Finally, it is argued that mandamus will not lie because the trial court did not stay *permanently* the action instituted on April 24th, but stayed it only until certain conditions precedent had been performed by the company. Elsewhere it is said that the action has been "only postponed for good reasons." But if the conditions precedent are conditions impossible to be performed by the company, the stay would seem to be a permanent one. We admit that a judge has the right and power to postpone a trial for good reasons; but the question here is, are the reasons assigned good reasons?

The trial judge has refused to act until we have applied for a stay in the state courts, but the statute expressly denies to the state courts the power to grant a stay. Is that reason a *good* one?

The trial judge has held that legislative powers have been imposed upon the state courts of Washington. The Washington supreme court has held that such powers cannot constitutionally be im-



posed upon it. Is the trial judge's reason then a *good* one?

It is urged, however, that the three-judge court gave the same reasons for its action that the trial judge gave for his action, and that consequently the trial judge's reasons must be good reasons.

But the three-judge court had only the power to grant or withhold relief *pendente lite*, while the trial judge had no such power and was not requested to exercise any such power.

The reasons given by the three-judge court for its action may have been good or bad; with them we are not now concerned. But because the reasons assigned by one tribunal for determining a certain question in a particular way may be good, it does not follow that the same reasons may justify the action of another tribunal in determining an entirely different question.

Judge Cushman took a certain action. He has assigned certain reasons for that action. The sole question here is, are these reasons good or bad. If his reasons are good ones, the writ should not issue; if they are not good ones, the writ should issue.

Respectfully submitted,

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POST, RUSSELL & HIGGINS,  
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*Solicitors for Petitioner.*

W. V. TANNER,  
*Of Counsel.*

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# In the United States Circuit Court of Appeals

For the Ninth Circuit

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THE PACIFIC TELEPHONE AND TELEGRAPH  
COMPANY (a corporation),

*Petitioner,*

v.

HONORABLE EDWARD E. CUSHMAN, United  
States District Judge for the Western  
District of Washington, Southern Divi-  
sion.

No. 4070

---

## PETITION FOR REHEARING

---

JOHN H. DUNBAR,

*Attorney General of the State of Washington.*

RAYMOND W. CLIFFORD,

*Assistant Attorney General of the State of Washington.*

*Solicitors for Honorable Edward E. Cush-  
man, United States District Judge for the  
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E. K. MURRAY,

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---

## PETITION FOR REHEARING

---

Comes now the Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division, by his attorneys, and respectfully petitions for a rehearing in the above entitled case for the following reasons:

### I.

The opinion of this court is largely based upon the conclusions reached by this court that the supreme court of the state of Washington is not vested with legislative power in this class of cases and that under section 10429 Remington's Compiled Statutes, the state courts have no power to grant a supersedeas

in a rate case of this character. It is respectfully submitted that it is unnecessary at this time for this court to go into the question of the legislative power of the supreme court or its power to issue supersedeas under the state's statutes, but that the state courts should under the rule of comity and convenience recognized by the three judges have first been given an opportunity to pass upon these questions of state law. The questions involved in this rate case are important ones to the state of Washington and under the practice followed by the federal courts since the formation of the union every reasonable opportunity should be allowed the state courts to first determine questions involving the constitutionality of state statutes. This court in its opinion holds that it is not permitted to indulge in any presumptions relative to these state statutes and we respectfully call the court's attention to the attitude of the supreme court of the United States in such questions as shown in the case of *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 232:

"There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the constitution, requires, by section 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. 1 Pollard's Code of Virginia, c 56a, 714. It may be that when an appeal is taken to the Supreme Court of Appeals this section will be held to apply and the appeal be declared too late. *We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice*

*a possibility.* If the present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed as brought too late the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again." (*Italics ours.*)

Irrespective, therefore, of whether or not the state courts have legislative power and can or cannot grant a stay of proceedings in rate cases of this character, it is submitted that this court should have taken the same view of the prior right of state courts to interpret the state statutes and should have refrained from determining these questions at this stage of the proceedings, especially in view of the fact that the same questions are now directly before the supreme court of the United States on the appeal from the decision of the three judges.

Attention is further called to the fact that this court in its opinion has apparently overlooked section 10441 Rem. Comp. Stat. which was cited by the three judges as evidence of the legislative power of the state court. While we believe this court, in passing upon the question of the issuance of the writ of mandamus in this case should have refrained from determining the question of the power of state courts

if the state statutes are to be construed, section 10441 should be considered as well as section 10429. The question of the constitutionality of the state's statutes and the powers of state courts should not have been passed upon in this proceeding. The rule governing the court in the consideration of an application for a writ of mandamus to the district court is well set forth in the case of *Ex Parte Metropolitan Water Company*, 220 U. S. 539, 546-55 Law Ed. 575-578, as follows:

"While these considerations dispose of the case, we briefly advert to an insistence made in argument that we should not take jurisdiction of the merits of the case as made in the circuit court, and determine whether or not the bill stated a case entitling to relief. Not being vested with original jurisdiction to pass upon the question of the validity of the Kansas statute, and the petitioner being entitled as of right to have the controversy as to the constitutionality of the statute, presented by its bill of complaint, passed upon by a tribunal having such original jurisdiction, it follows that *we do not possess a discretion to grant or refuse the writ, dependent upon our conception as to whether the Kansas statute is or is not constitutional.*" (Italics ours.)

Considerable stress is laid in the opinion of this court upon the case of *Oklahoma Gas Company v. Russell*, 261 U. S. 290, but the court seems to have overlooked the fact that distinguishes that case from the case at bar as pointed out in our brief, namely, that in the Russell case the company, *before having recourse to the federal courts applied to the state supreme court for a supersedeas and was denied.* It



is therefore, entirely different from the case here where the telephone company has refused at all stages of the proceedings to apply to the state courts.

## II.

The undoubted effect of the decision of this court is to overrule and reverse the decision of the three judges and the order of the district court in the original suit started by the telephone company. It is true as stated in the opinion that this court may issue a writ of mandamus in aid of its appellant jurisdiction when the lower court has wrongfully refused to proceed with the case, but in the instant case the special tribunal of three judges after going into the subject fully, decided that as a matter of law that tribunal should not entertain jurisdiction of the application for a preliminary injunction until the telephone company had exhausted its remedies in the state courts or been refused a stay by the state courts. Thereafter the district court stayed proceedings in his court for the same reasons that had determined the three judges to deny the application for a preliminary injunction. It is well established law that the decision of the three judges and the order of the district court cannot be reviewed in a mandamus proceeding. With reference to the decision of the three judges, the telephone company had its option of complying with their suggestion that they apply to the state courts for relief or appealing therefrom to the supreme court of the United States. The question of whether the three judges were right or



wrong cannot be reviewed by this court, yet we do not see how one reading the opinion of this court can fail to see clearly that this court has determined that the three judges were wrong in the reasons which actuated them to deny the preliminary injunction and has in fact reversed the decision of the three judges.

The order of the district court being based upon the same reasons as the decision of the three judges, upon the entry of such order, the telephone company had its option of applying to the state courts for relief and upon the showing that they were unable to obtain such relief after a bona fide attempt no doubt the district court would then have proceeded to hear their case, or they could have decided to abide the result of an appeal from the order of the three judges which in the event the supreme court of the United States reverses the three judges, would at once permit the district court to proceed with the suit on the merits, or the telephone company could have refused to proceed further and obtained an order of dismissal from which final order an appeal could be prosecuted. The telephone company, however, has refused to apply to the state courts in any shape or form whatever; has taken an appeal from the order of the three judges, but does not wish to abide the result of such appeal before continuing proceedings in the district court, and evidently did not wish to have an order of dismissal entered so that it might appeal from such final order and we do not see how the conclu-

sion can be escaped that the application for writ of mandamus was simply used as a substitute for an appeal or a writ of error in order that the decision of the three judges and the order of the district court might perhaps be reviewed and reversed by this court. In its final analysis the proceedings before the three judges, the proceedings before the district court the proceedings before this court in the instant case and the appeal to the supreme court of the United States involved but one question, namely that of jurisdiction and it was impossible for this court to direct the issuance of a writ of mandamus without reversing the decision of the three judges and the order of the district court in regard to jurisdiction. This question of jurisdiction in view of the appeal taken to the supreme court can only be properly determined by that court and not by this court in a mandamus proceeding.

### III.

This court in its opinion devotes but little attention to the proposition urged in our brief that neither the district court nor this court now have jurisdiction of this proceeding for the reason that an appeal from the decision of the three judges is pending before the supreme court of the United States. In discussing that matter this court in its opinion states:

“This was not one of the reasons assigned by the trial judge for refusing to proceed, and perhaps we should not consider it.”

We think the court has overlooked the dates involved. The order of the trial court denying the telephone company's motion to require the defendant to answer forthwith was made on July 9, 1923. The notice of appeal from the decision of the three judges was filed by the company on July 16, 1923, one week after the entry of this order by the trial court. Naturally, therefore, it was not a ground for the trial court's decision on the motion, nor was the appeal called to the attention of this court by the telephone company in its petition for the writ of mandamus. In our answer to the order to show cause, however, all of the papers in the appeal were made a part of the record and the entire record on appeal was before this court. In view of the fact that the record was before the court and that the appeal had been taken by the company after the order of the district court complained of and before application to this court for the writ of mandamus and in further view of what we believe to be the effect of such appeal, we feel that this court should reconsider this question and thoroughly examine the effects of the appeal.

The opinion cites Elliott on Appellate Procedure, section 542, relative to the view that an appeal from an interlocutory order does not completely oust jurisdiction of the trial court. We call attention to one statement in that section:

"If, for instance, an appeal is duly taken from an order appointing a receiver, only so much of the

case as affects that order is carried out of the jurisdiction of the trial court, and, as it retains jurisdiction of the principal issues, it may proceed to hear and determine them, *but it certainly could not hear or decide the branch of the case removed by the appeal to the higher court.*" (Italics ours.)

No cases are cited in the text to sustain this statement, so we are unable to determine just what the text has in mind, but a clearer statement of the rule will be found in 3 Corpus Juris 1259 as follows:

"Section 1371-2. Incidental or Interlocutory Appeals. An appeal on an incidental or interlocutory matter does not divest jurisdiction, but the trial court or parties may proceed in matters not involved in the appeal and which are entirely collateral to the part of the case taken up; and, as nothing is in the upper court but the order, a motion for an order in the cause cannot be entertained in that court. The lower court, however, cannot proceed in such manner as to lead to a decision, pending the appeal, of the very question involved on the appeal, or of a question which cannot properly arise or be determined until after the determination of the appeal."

The following cases are cited in Corpus Juris and sustain the rule as given:

*Ex Parte City Council of Montgomery*, 114 Ala. 115, 14 So. 364,

Syl.—"An appeal from an order dissolving a temporary injunction restraining defendant from selling plaintiff's land under a decree requires the supreme court to pass on the question whether the bill contains equity; and hence, during the pendency of such appeal, the lower court cannot hear and deter-



mine a demurrer taken to the bill for want of equity, and mandamus will not issue to compel it so to do."

*Sease v. Dobson*, 34 So. Car. 345, 13 S. E. 530,

Syl. 3—"A hearing on the merits was properly refused, where it would require the decision of a material question involved in a pending appeal from an order in the case refusing an injunction."

*Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447;

*Bonner v. Rodman*, 163 No. Car. 1, 79 S. E. 271.

The following additional cases also sustain the rule that on an appeal from an interlocutory order, the lower court cannot take further proceedings pending the appeal when the appeal involves the same questions upon which the trial court must pass in further proceedings.

*State v. Earle*, 44 S. E. 781 (So. Car.);

*Wylie v. Blake & Knowles Steam Pump Works*, 221 Mass. 489, 109 N. E. 386;

*Combes v. Adams*, 150 N. Car. 64, 63 S. E. 186;

*Joyner v. Champion Fibre Co.*, 101 S. E. 373, (No. Car.);

*Napier v. Dover*, 104 S. E. 214 (Ga.);

*Hill v. Wood*, 238 S. W. 309 (Texas);

*McKee & McNeal v. Martin*, 241 S. W. 782, 243 S. W. 575 (Texas).

At the very threshold of the original proceeding in the district court the three judges were obliged to consider the question of jurisdiction and the three judges determined that in accordance with the rule of comity and convenience followed by the federal courts in cases involving procedure under section 266



of the judicial code, the telephone company was not entitled to be heard on the merits in an application for a preliminary injunction until it had exhausted its state remedies. In other words, the decision of the three judges is essentially based on the question of jurisdiction.

When the company, after the decision of the three judges and prior to an appeal from such decision, applied to the trial judge to proceed with the suit, the trial judge was also obliged to consider the question of jurisdiction and for the same reasons that the three judges had set forth for not considering the preliminary injunction, the trial judge determined that he ought not entertain jurisdiction until the company had exhausted its state remedies. In other words, the trial judge held that the same rule of comity and convenience restrained him from proceeding on a hearing for a permanent injunction that influenced the three judges as to a hearing on the preliminary injunction. Therefore, in the district court, as well as before the three judges, the sole question involved was the question of jurisdiction.

Section 266 of the judicial code expressly authorizes an appeal direct to the supreme court of the United States from the order granting or denying an interlocutory injunction. It is a rule that interlocutory orders are not appealable unless such appeal is expressly authorized by statute. In this case the appeal has been expressly authorized, and we believe

that it was unquestionably the intention by such authorization in the event of a denial of the injunction on jurisdictional grounds to have that question cleared up before any further proceedings were had, as otherwise great confusion and uncertainty is bound to result.

It is evident that if the district court in pursuance to the mandate issued by this court should deny the motion to dismiss and proceed with the case, and later the supreme court of the United States in determining the appeal should sustain the three judges and hold that the company should have first exhausted its state remedies, the proceedings in the district court will have been futile and ridiculous and inasmuch as the company has seen fit to carry the question of jurisdiction to the supreme court of the United States, we submit that it should abide by the result of that action and await the decision of that court instead of applying to this court for relief.

Under the rule governing appeals from interlocutory orders cited above, we believe that neither the district court nor this court has jurisdiction to take any further proceedings until this question of jurisdiction involved in the appeal has been settled by the only court authorized by law to settle it, but even though this court should hold that such appeal did not absolutely stay further proceedings as a matter of law, we still believe that proceedings should be stayed as a matter of orderly procedure and due administration of justice. The statement of the district court as to its reasons for staying the entry of

a final decree in the case of *Hanssen v. Pusey & Jones Co.*, 286 Federal 707, should, we think, govern this court and the district court in a proceeding like this where the question of jurisdiction is pending before the supreme court on appeal. In the case cited, the court observes:

“Notwithstanding the foregoing conclusions, and the refusal to permit the filing of the affidavit, this court has notice of the fact that the Supreme Court now has before it for its review and determination the record and questions that were before this court and the Court of Appeals upon the application for the appointment of receivers *pendente lite*. It may be that the entry of a final decree at this time would make moot the questions now before the Supreme Court in this cause. I think, under such circumstances, proper deference to the Supreme Court, orderly procedure, and due administration of justice require this court of its own motion to postpone the entry of a final decree in this cause until after the decision of the Supreme Court I am the more convinced of the soundness of this conclusion by reason of the fact that the final hearing was had, as a result of the stipulation of the parties, upon the identical record that is now before the Supreme Court.”

Respectfully submitted,

JOHN H. DUNBAR,

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*Solicitors for Honorable Edward E. Cushman, United States District Judge for the Western District of Washington, Southern Division.*

E. K. MURRAY,

THOMAS J. L. KENNEDY,

*Of Counsel.*

STATE OF WASHINGTON, }  
County of Thurston, } ss.

JOHN H. DUNBAR, being first duly sworn on oath deposes and says: That he is one of the attorneys of record for the respondent in the above entitled case, and that he hereby certifies that, in his judgment, this petition for a rehearing is well founded, and that it is not unjust for appellee.

.....  
Subscribed and sworn to before me this....  
.....day of November, 1923.

.....  
*Notary Public in and for the State  
of Washington, residing at Olympia.*

